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April 28, 2017

Via CM/ECF

Mark Langer
Clerk of Court
U.S. Court of Appeals for the D.C. Circuit
E. Barrett Prettyman U.S. Courthouse
  and William B. Bryant Annex
333 Constitution Ave., N.W.
Washington, D.C. 20001

Re: *U.S. Telecom Ass'n v. FCC*, No. 15-1063 (consolidated with No. 15-1091 and others)

Dear Mr. Langer:

I write respectfully to alert the Court to the public release by the Federal Communications Commission ("FCC") of a draft Notice of Proposed Rulemaking ("NPRM") entitled *Restoring Internet Freedom*, WC Docket No. 17-108 (April 27, 2017) (Attachment A). The draft NPRM is tentatively scheduled for consideration at the FCC's May 18, 2017 open meeting (Attachment B). Although the document does not constitute official action by the FCC, we bring it to the Court's attention in the interest of the Court's full information.

Respectfully submitted,

/s/ Peter D. Keisler

On behalf of petitioners ACA, AT&T,
CenturyLink, CTIA, NCTA, and USTelecom

Enclosure

cc: Counsel of Record

Sidley Austin (DC) LLP is a Delaware limited liability partnership doing business as Sidley Austin LLP and practicing in affiliation with other Sidley Austin partnerships.

ATTACHMENT A

April 27, 2017

FACT SHEET*

Restoring Internet Freedom

Notice of Proposed Rulemaking – WC Docket No. 17-108

Background: For almost twenty years, the Internet flourished under a light-touch regulatory approach. During this time, the Internet underwent rapid, and unprecedented, growth. Internet service providers (ISPs) invested approximately $1.5 trillion in the Internet ecosystem, and American consumers enthusiastically responded. Businesses developed in ways that government officials could not have fathomed even a decade ago. The Internet became an ever-increasing part of the American economy, offering new and innovative changes in how we work, learn, receive medical care, and entertain ourselves. The Commission's 2015 decision to subject ISPs to Title II utility-style regulations risks that innovation, serving ultimately to threaten the open Internet it purported to preserve.

The Chairman of the Federal Communications Commission (FCC) has proposed a *Notice of Proposed Rulemaking (NPRM)* to end the utility-style regulatory approach that gives government control of the Internet and to restore the market-based policies necessary to preserve the future of Internet Freedom, and to reverse the decline in infrastructure investment, innovation, and options for consumers put into motion by the FCC in 2015. To determine how to best honor our commitment to restoring Internet Freedom, the *NPRM* also evaluates the existing rules governing Internet service providers' practices.

What the NPRM Would Do:

- Propose to reinstate the information service classification of broadband Internet access service and return to the light-touch regulatory framework first established on a bipartisan basis during the Clinton Administration.
- Propose to reinstate the determination that mobile broadband Internet access service is not a commercial mobile service and in conjunction revisit the elements of the *Title II Order* that modified or reinterpreted key terms in section 332 of the Communications Act and our implementing rules.
- Propose to return authority to the Federal Trade Commission to police the privacy practices of Internet service providers.
- Propose to eliminate the vague Internet conduct standard.
- Seek comment on whether to keep, modify, or eliminate the bright-line rules set forth in the *Title II Order*.
- Propose to re-evaluate the Commission's enforcement regime to analyze whether *ex ante* regulatory intervention in the market is necessary.
- Propose to conduct a cost-benefit analysis as part of this proceeding.

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* This document is being released as part of a "permit-but-disclose" proceeding. Any presentations or views on the subject expressed to the Commission or its staff, including by email, must be filed in WC Docket No. 17-108, which may be accessed via the Electronic Comment Filing System (https://www.fcc.gov/ecfs/). Before filing, participants should familiarize themselves with the Commission's *ex parte* rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission's meeting. *See* 47 CFR § 1.1200 *et seq*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Restoring Internet Freedom	)	WC Docket No. 17-108

NOTICE OF PROPOSED RULEMAKING*

Adopted: [] **Released: []**

Comment Date: July 17, 2017
Reply Comment Date: August 16, 2017

By the Commission:

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* This document has been circulated for tentative consideration by the Commission at its May 2017 open meeting. The issues referenced in this document and the Commission's ultimate resolutions of those issues remain under consideration and subject to change. This document does not constitute any official action by the Commission. However, the Chairman has determined that, in the interest of promoting the public's ability to understand the nature and scope of issues under consideration, the public interest would be served by making this document publicly available. The Commission's *ex parte* rules apply and presentations are subject to "permit-but-disclose" *ex parte* rules. *See*, *e.g.*, 47 CFR §§ 1.1206, 1.1200(a). Participants in this proceeding should familiarize themselves with the Commission's ex parte rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission's meeting. *See* 47 CFR §§ 1.1200(a), 1.1203

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I. INTRODUCTION

1. Americans cherish a free and open Internet. And for almost twenty years, the Internet flourished under a light touch regulatory approach. It was a framework that our nation's elected leaders put in place on a bipartisan basis. President Clinton and a Republican Congress passed the Telecommunications Act of 1996, which established the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation."[1]

2. During this time, the Internet underwent rapid, and unprecedented, growth.[2] Internet service providers (ISPs) invested over $1.5 trillion in the Internet ecosystem[3] and American consumers enthusiastically responded. Businesses developed in ways that the policy makers could not have fathomed even a decade ago. Google, Facebook, Netflix, and countless other online businesses launched in this country and became worldwide success stories. The Internet became an ever-increasing part of the American economy, offering new and innovative changes in how we work, learn, receive medical care, and entertain ourselves.[4]

3. But two years ago, the FCC changed course. It decided to apply utility-style regulation to the Internet. This decision represented a massive and unprecedented shift in favor of government control of the Internet.

4. The Commission's *Title II Order* has put at risk online investment and innovation, threatening the very open Internet it purported to preserve. Investment in broadband networks declined. Internet service providers have pulled back on plans to deploy new and upgraded infrastructure and services to consumers. This is particularly true of the smallest Internet service providers that serve consumers in rural, low-income, and other underserved communities. Many good-paying jobs were lost

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[1] 47 U.S.C. § 230(b)(2).

[2] *See, e.g.*, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in A Reasonable & Timely Fashion, & Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, As Amended by the Broadband Data Improvement Act*, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, 30 FCC Rcd 1375, 1383, para. 15 (2015) (*2015 Broadband Progress Report*) (noting that broadband providers recognized "both the value of and the need for continued investment to develop a robust broadband network that will meet consumers' demands," and that between 2012 and 2013, broadband providers had increased their investments by approximately 10 percent, to $75 billion).

[3] USTelecom, Broadband Investment, Historical Broadband Provider Capex (2017) (data through 2015), https://www.ustelecom.org/broadband-industry/broadband-industry-stats/investment.

[4] *See, e.g.*, Aaron Smith, Pew Research Center, Searching for Work in the Digital Era at 2 (2015), http://www.pewinternet.org/files/2015/11/PI_2015-11-19-Internet-and-Job-Seeking_FINAL.pdf (detailing the importance of the Internet for job seekers); *Lifeline & Link Up Reform & Modernization*, Order on Reconsideration, 31 FCC Rcd 3962, 3967, para. 16 (2016) (discussing the benefits of telemedicine).

as the result of these pull backs. And the order has weakened Americans' online privacy by stripping the Federal Trade Commission—the nation's premier consumer protection agency—of its jurisdiction over ISPs' privacy and data security practices.

5. Today, we take a much-needed first step toward returning to the successful bipartisan framework that created the free and open Internet and, for almost twenty years, saw it flourish. By proposing to end the utility-style regulatory approach that gives government control of the Internet, we aim to restore the market-based policies necessary to preserve the future of Internet Freedom, and to reverse the decline in infrastructure investment, innovation, and options for consumers put into motion by the FCC in 2015. Our actions today continue our critical work to promote broadband deployment to rural consumers and infrastructure investment throughout our nation, to brighten the future of innovation both within networks and at their edge, and to close the digital divide.

II. BACKGROUND

6. Long before the commercialization of the Internet, federal law drew a line between the heavily regulated common carrier services and more lightly regulated services that went beyond mere transmission. Starting in 1966, the Commission initiated the *Computer Inquiries*,[5] which created a dichotomy between basic and enhanced services.[6] Basic services offered "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information"[7] and were "regulated under Title II of the [Communications] Act."[8] Enhanced services were "any offering over the telecommunications network which is more than a basic transmission service. In an enhanced service, for example, computer processing applications are used to act on the content, code, protocol, and other aspects of the subscriber's information."[9] Unlike basic services, the Commission found that "enhanced services should not be regulated under the Act."[10]

7. Just two years later, the federal courts would draw a similar line in resolving the government's antitrust case against AT&T. The Modification of Final Judgment (MFJ) of 1982 distinguished between "telecommunications services," which Bell Operating Companies could offer when "actually regulated by tariff,"[11] and "information services," including "data processing and other computer-related services"[12] and "electronic publishing services,"[13] which Bell Operating Companies were prohibited from offering entirely.[14]

8. In the Telecommunications Act of 1996, intended to "promote competition and reduce regulation,"[15] President Clinton and Congress drew a line between lightly regulated "information

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[5] *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services*, Notice of Inquiry, 7 FCC 2d 11 (1966).

[6] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, Final Decision, 77 FCC 2d 384, 420, para. 97 (1980).

[7] *Id.* at 420, para. 96.

[8] *Id.* at 428, para. 114.

[9] *Id.* at 420, para. 97.

[10] *Id.* at 428, para. 114.

[11] *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 228–29 (D.D.C. 1982).

[12] *Id*. at 178.

[13] *Id*. at 180.

[14] *Id*. at 228.

[15] Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (describing the purpose of the 1996 Act as "[a]n Act [t]o promote competition and reduce regulation in order to secure lower prices and higher

services" and more heavily regulated "telecommunications services."[16] They also found that the "Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation"[17] and declared it the policy of the United States to "promote the continued development of the Internet and other interactive computer services and other interactive media" and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[18] The 1996 Act went on to define "interactive computer service" to include "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet . . . ."[19]

9. Congress weighed in again two years later. Five Senators—John Ashcroft, Wendell Ford, John F. Kerry, Spencer Abraham, and Ron Wyden—wrote the Commission that "[n]othing in the 1996 Act or its legislative history suggests that Congress intended to alter the current classification of Internet and other information services or to expand traditional telephone regulation to new and advanced services."[20] These five members further warned that if the Commission "subject[ed] some or all information service providers to telephone regulation, it seriously would chill the growth and development of advanced services to the detriment of our economic and educational well-being."[21]

10. For the next 16 years, the Commission repeatedly followed their advice, opting for a light-touch approach to the Internet that favored discrete and targeted actions over traditional pre-emptive, sweeping regulation of Internet service providers. In the 1998 *Stevens Report*, the Commission comprehensively reviewed the Act's definitions as they applied to the emerging technology of the Internet and concluded that Internet access service was properly classified as an information service.[22] The *Stevens Report* exhaustively reviewed the text and legislative history of the Telecommunications Act, along with the agency's own administrative precedent and the courts' administration of antitrust law.[23] Looking to the Act's text, the Commission concluded that "Internet access providers do not offer a pure transmission path; they combine computer processing, information provision, and other computer-mediated offerings with data transport,"[24] and it "recognize[d] the unique qualities of the Internet, and [did] not presume that legacy regulatory frameworks are appropriately applied to it."[25] Further, even "address[ing] the classification of Internet access service *de novo*" the *Stevens Report* reached the same

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quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies").

[16] 47 U.S.C. § 153(24), (53).

[17] 47 U.S.C. § 230(a)(4).

[18] 47 U.S.C. § 230(b)(1), (2).

[19] 47 U.S.C. § 230(f)(2).

[20] Letter from Senators John Ashcroft, Wendell Ford, John Kerry, Spencer Abraham, and Ron Wyden to the Honorable William E. Kennard, Chairman, FCC, at 1 (Mar. 23, 1998) (Five Senators Letter), *available at* http://apps.fcc.gov/ecfs/document/view?id=2038710001.

[21] *Id.*

[22] *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11536, para. 73 (1998) (*Stevens Report*).

[23] *See, e.g.*, *id.*, 13 FCC Rcd at 11513, 11520, 11536–37, paras. 27, 39, 74–75. The *Stevens Report* also noted that "[s]ince *Computer II*, we have made it clear that offerings by non-facilities-based providers combining communications and computing components should always be deemed enhanced," while "the matter is more complicated when it comes to offerings by facilities-based providers." *Id.* at 11530, para. 60.

[24] *Id*. at 11536, para. 73.

[25] *Id*. at 11540, para. 82.

conclusion: Internet access service is an information service according to the statute.[26] The *Stevens Report* also found that subjecting Internet service providers and other information service providers to "the broad range of Title II constraints," would "seriously curtail the regulatory freedom that the Commission concluded in *Computer II* was important to the healthy and competitive development of the enhanced-services industry."[27]

11. In the 2002 *Cable Modem Order*, the Commission classified broadband Internet access service over cable systems as an "interstate information service."[28] The Commission did so based on the "functions that cable modem service makes available to its end users,"[29] on the fact that the "telecommunications component is not, however, separable from the data-processing capabilities of the service,"[30] and is an information service "regardless of whether subscribers use all of the functions provided as part of the service, such as e-mail or web-hosting, and regardless of whether every cable modem service provider offers each function that could be included in the service."[31] The Commission was also guided by its belief that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market,"[32] and the knowledge that regulatory uncertainty "may discourage investment and innovation."[33]

12. In June 2005, the Supreme Court decisively upheld the Commission's 2002 classification of broadband Internet access service over cable systems as a lightly-regulated Title I information service.[34]

13. In 2004, then FCC-Chairman Michael Powell announced four principles for Internet freedom to further ensure that the Internet would remain a place for free and open innovation with minimal regulation.[35] These four "Internet freedoms" include the freedom to access lawful content, the freedom to use applications, the freedom to attach personal devices to the network, and the freedom to obtain service plan information.[36]

14. In the 2005 *Wireline Broadband Classification Order*, the Commission classified broadband Internet access service over wireline facilities as an information service.[37] In reaching this conclusion, the Commission relied on the plain text of the Act, finding that "providers of wireline

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[26] *See, e.g.*, *id.*

[27] *Id.* at 11524, para. 46.

[28] *See Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4802, para. 7 (2002) (*Cable Modem Order*).

[29] *Id.* at 4821, para. 35.

[30] *Id.* at 4823, para. 39.

[31] *Id.* at 4822–23, para. 38 (footnote omitted).

[32] *Id.* at para. 5.

[33] *Id.*

[34] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (*Brand X*).

[35] Michael K. Powell, Chairman, Federal Communications Commission, Preserving Internet Freedom: Guiding Principles for the Industry, Remarks at the Silicon Flatirons Symposium (Feb. 8, 2004), https://apps.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf.

[36] *Id.*

[37] *See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Classification Order*).

broadband Internet access service offer subscribers the ability to run a variety of applications that fit under the characteristics stated in the information service definition,"[38] and that users of wireline broadband Internet access service were provided "more than [a] pure transmission path" whenever they accessed the Internet.[39]

15. In 2005, the Commission also unanimously endorsed the four Internet freedoms in the *Internet Policy Statement*.[40] The *Internet Policy Statement* announced the Commission's intent to "incorporate [these] principles into its ongoing policymaking activities" in order to "foster creation, adoption and use of Internet broadband content, applications, services and attachments, and to ensure consumers benefit from the innovation that comes from competition."[41]

16. In the 2006 *BPL-Enabled Broadband Order*, the Commission concluded that broadband Internet access service over power lines was properly classified as an information service.[42] This decision established "a minimal regulatory environment" which promoted "ubiquitous availability of broadband to all Americans."[43] The Commission noted that broadband-powerline-enabled Internet access service "combines computer processing, information provision, and computer interactivity with data transport, [which] enable[es] end users to run a variety of applications,"[44] and concluded that classification as an information service "encourage[es] the deployment of broadband Internet access services."[45]

17. In the 2007 *Wireless Broadband Internet Access Order*, the Commission classified wireless broadband Internet access service as an information service, again recognizing the "minimal regulatory environment" that promoted the "ubiquitous availability of broadband to all Americans."[46] Consistent with its prior interpretations, the Commission concluded that "wireless broadband Internet access service offers a single, integrated service to end users, Internet access, that inextricably combines the transmission of data with computer processing, information provision, and computer interactivity, for the purpose of enabling end users to run a variety of applications."[47] The Commission also found that "mobile wireless broadband Internet access service is not a 'commercial mobile radio service' as that term is defined in the Act and implemented in the Commission's rules."[48]

18. In the 2008 *Comcast-BitTorrent Order*, the Commission sought to directly enforce

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[38] *Id*. at 14860, para. 9.

[39] *Id*. at 14864, para. 15.

[40] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, GN Docket No. 00-185, CC Docket Nos. 02-33, 01-33, 98-10, 95-20, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986 (2005) (*Internet Policy Statement*).

[41] *Internet Policy Statement*, 20 FCC Rcd at 14988, para 5. The Commission did this, for example, by incorporating such principles in its rules governing certain wireless spectrum. *See Service Rules For the 698-746, 747-762 and 777-792 MHz Bands, et al.*, WT 06-150 et al., Second Report and Order, 22 FCC Rcd. 15289, 15361, 15365, paras. 194, 206 (2007).

[42] *See United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006) (*BPL-Enabled Broadband Order*).

[43] *Id*. at 13281, para. 2.

[44] *Id*. at 13826, para. 9.

[45] *Id*. at 13827, para. 10.

[46] *See Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5902, para. 2 (2007) (*Wireless Broadband Internet Access Order*).

[47] *Id*. at 5910, para. 26.

[48] *Id*. at 5916, para. 41.

federal Internet policy consistent with the *Internet Policy Statement*, finding Comcast's actions "contravene[d] . . . federal policy" by "significantly imped[ing] consumers' ability to access the content and use the applications of their choice."[49] In 2010, the U.S. Court of Appeals for the D.C. Circuit rejected the Commission's action, holding that the Commission had not justified its action as a valid exercise of ancillary authority.[50]

19. In response, the Commission adopted the 2010 *Open Internet Order*, where once again the Commission specifically rejected more heavy-handed regulation of broadband Internet access service.[51] Instead, the *Open Internet Order* relied on, among other things, newly-claimed regulatory authority under section 706 of the Telecommunications Act to establish no-blocking and no-unreasonable-discrimination rules as well as a requirement that broadband Internet access service providers "publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services."[52] In doing so, the Commission distinguished between fixed and mobile broadband Internet access services, reasoning that the latter "presents special considerations that suggest differences in how and when open Internet protections should apply."[53]

20. In 2014, the D.C. Circuit vacated the no-blocking and no-unreasonable-discrimination rules adopted in the *Open Internet Order*, finding that the rules impermissibly regulated broadband Internet access service providers as common carriers,[54] in conflict with the Commission's prior determination that broadband Internet access service was not a telecommunications service and that mobile broadband Internet access service was not a commercial mobile service.[55] The D.C. Circuit nonetheless upheld the transparency rule,[56] claimed the Commission had authority to regulate broadband Internet access service providers under section 706 of the Telecommunications Act, and suggested that no-blocking and no-unreasonable-discrimination rules might be permissible if Internet service providers could engage in individualized bargaining.[57]

21. Later that year, the Commission embarked yet again down the path of rulemaking, proposing to rely on section 706 of the Telecommunications Act to adopt enforceable rules using the

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[49] *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management,"* File No. EB-08-IH-1518, WC Docket No. 07-52, Memorandum Opinion and Order, 23 FCC Rcd 13028, 13054, 13057, paras. 44, 49 (2008) (*Comcast-BitTorrent Order*).

[50] *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010). Among other things, the court held that section 706 of the 1996 Act could not serve as the source of direct authority to which the Commission's action was ancillary because the Commission was bound in *Comcast* by a prior Commission determination that section 706 did not constitute a direct grant of authority. *Id.* at 658–59.

[51] *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17972–80, 17981, paras. 124–35, 137 (2010) (*Open Internet Order*).

[52] *Id.* at 17992 (Appendix A).

[53] *Id.* at 17956, para. 94.

[54] *Verizon v. FCC*, 740 F.3d 623, 655-58 (D.C. Cir. 2014) (*Verizon*) (vacating the Commission's rule prohibiting "unreasonable discrimination" by fixed broadband providers on the theory that it "so limited broadband providers' control over edge providers' transmissions that [it] constitute[d] common carriage *per se*" and finding that the no-blocking rules "would appear on their face" to impose common carrier obligations on fixed and mobile broadband providers).

[55] *Id.* at 650.

[56] *Id.* at 635–42.

[57] *See, e.g.*, *id.* at 657 (quoting *Cellco Partnership v. FCC*, 700 F.3d 534, 549 (D.C. Cir. 2012)).

court's "roadmap."[58]

22. In November 2014, then-President Obama called on the FCC to "reclassify consumer broadband service under Title II of the Telecommunications Act."[59] Three months later, the Commission adopted the *Title II Order*, reclassifying broadband Internet access services from information services to telecommunications services.[60] In doing so, the Commission found it necessary to forbear from enforcing the "vast majority of rules adopted under Title II," including "30 statutory provisions[,] and render over 700 codified rules inapplicable."[61] The Commission adopted no-blocking, no-throttling, and no-paid-prioritization rules, as well as a general Internet conduct standard and "enhancements" to the transparency rule.[62] In 2016, a divided panel of the D.C. Circuit Court of Appeals upheld the *Title II Order* in *United States Telecom Ass'n v. FCC*.[63] Petitioners have sought a rehearing of the case *en banc*.[64]

III. ENDING PUBLIC-UTILITY REGULATION OF THE INTERNET

23. Between enactment of the Telecommunications Act and the 2015 adoption of the *Title II Order*, the free and open Internet flourished: Providers invested over $1.5 trillion to construct networks; high-speed Internet access proliferated at affordable rates; and consumers were able to enjoy all that the Internet had to offer. In 2015, the Commission abruptly departed from its prior posture and classified broadband Internet access service as a telecommunications service subject to public-utility regulations under Title II.

24. Today, we propose to reinstate the information service classification of broadband Internet access service and return to the light-touch regulatory framework first established on a bipartisan basis during the Clinton Administration. We also propose to reinstate the determination that mobile broadband Internet access service is not a commercial mobile service.

A. Reinstating the Information Service Classification of Broadband Internet Access Service

25. Our proposal to classify broadband Internet access service as an information service is based on a number of factors. First, we examine the text, structure, and history of the Communications Act and the Telecommunications Act, combined with the technical details of how the Internet works. Second, we examine Commission precedent. Third, we examine public policy and our goal of benefiting consumers through greater innovation, investment, and competition. We seek comment on our proposals and these analyses.

1. The Text and Structure of the Act

26. We start with the text of the Act itself. Section 3 of the Act defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic

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[58] *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (2014) (*2014 Notice*).

[59] President Obama, Statement on Net Neutrality (Nov. 10, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/11/10/statement-president-net-neutrality.

[60] *In the Matter of Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (*Title II Order*).

[61] *Id.* at 5616, para. 51.

[62] *Id.* at 5607-09, paras. 15–24.

[63] *United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir 2016) (*USTelecom*), pets. for reh'g pending.

[64] *See* Joint Petition of USTelecom and CenturyLink for Rehearing En Banc, *United States Telecom Ass'n v. FCC*, (D.C. Cir. filed Jul. 29, 2016).

publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[65] Section 3 defines a "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[66] Section 3 also defines "telecommunications," used in each of the prior two definitions, as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[67]

27. We believe that Internet service providers offer the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[68] Whether posting on social media or drafting a blog, a broadband Internet user is able to generate and make available information online. Whether reading a newspaper's website or browsing the results from a search engine, a broadband Internet user is able to acquire and retrieve information online. Whether it's an address book or a grocery list, a broadband Internet user is able to store and utilize information online. Whether uploading filtered photographs or translating text into a foreign language, a broadband Internet user is able to transform and process information online. In short, broadband Internet access service appears to offer its users the "capability" to perform each and every one of the functions listed in the definition—and accordingly appears to be an information service by definition. We seek comment on this analysis. Can broadband Internet users indeed access these capabilities? Are there other capabilities that a broadband Internet user may receive with service? If broadband Internet access service does not afford one of the listed capabilities to users, what effect would that have on our statutory analysis? More fundamentally, we seek comment on how the Commission should assess whether a broadband provider is "offering" a capability. Should we asses this from the perspective of the user, from the provider, or through some other lens?

28. In the *Cable Modem Order*, the Commission recognized that broadband Internet users often used services from third parties: "[S]ubscribers, by 'click-through' access, may obtain many functions from companies with whom the cable operator has not even a contractual relationship. For example, a subscriber to Comcast's cable modem service may bypass that company's web browser, proprietary content, and email. The subscriber is free to download and use instead, for example, a web browser from Netscape, content from Fox News, and e-mail in the form of Microsoft's 'Hotmail.'"[69] It nonetheless found the classification appropriate "regardless of whether subscribers use all of the functions provided as part of the service, such as e-mail or web-hosting, and regardless of whether every cable modem service provider offers each function that could be included in the service."[70] In the *Title II Order*, the Commission in turn found that "consumers are very likely to use their high-speed Internet connections to take advantage of competing services offered by third parties"[71] and asserted the service "is useful to consumers today primarily as a conduit for reaching modular content, applications, and services that are provided by unaffiliated third parties."[72] We seek comment on how consumers are using broadband Internet access service today. It appears that, as in 2002 and 2013, broadband Internet users "obtain many functions from companies" other than their Internet service provider. It also appears that many broadband Internet users rely on services, such as Domain Name Service (DNS) and email, from

[65] 47 U.S.C. § 153(24).

[66] 47 U.S.C. § 153(53).

[67] 47 U.S.C. § 153(50).

[68] 47 U.S.C. § 153(24).

[69] *Cable Modem Order*, 17 FCC Rcd at 4816, para. 25.

[70] *Id.* at 4822–23, para. 38 (footnote omitted).

[71] *Title II Order*, 30 FCC Rcd at 5753, para. 347.

[72] *Id.* at 5755, para. 350.

their ISP. Is that correct? If not, what services are broadband Internet users accessing from what providers? More generally, we seek comment on the relevance of this analysis. The definition of "information service" speaks to the "capability" to perform certain functions. Is a consumer capable of accessing these online services without Internet access service? Could a consumer access these online services using traditional telecommunications services like telephone service or point-to-point special access[73]? Or are we correct that offering Internet access is precisely what makes the service capable of "generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information" to consumers?

29. In contrast, Internet service providers do not appear to offer "telecommunications," i.e., "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received," to their users. *For one*, broadband Internet users do not typically specify the "points" between and among which information is sent online. Instead, routing decisions are based on the architecture of the network, not on consumers' instructions, and consumers are often unaware of where online content is stored. Domain names must be translated into IP addresses (and there is no one-to-one correspondence between the two). Even IP addresses may not specify where information is transmitted to or from because caching servers store and serve popular information to reduce network loads. In short, broadband Internet users are paying for the access to information "with no knowledge of the physical location of the server where that information resides."[74] We believe that consumers want and pay for these functionalities that go beyond mere transmission—and that they have come to expect them as part and parcel of broadband Internet access service. We seek comment on our analysis. How are broadband Internet users' requests for information handled by Internet service providers today? What functionalities beyond mere transmission do Internet service providers incorporate into their broadband Internet access service? We particularly seek comment on the *Title II Order*'s assertion that the phrase "points specified by the user" is ambiguous[75]—how should we interpret that phrase so that it carries with it independent meaning and is not mere surplusage? Is it enough, as the *Title II Order* asserted, for a broadband Internet user to specify the information he is trying to access but not the "points" between or among which the information will be transmitted? Does it matter that the Internet service provider specifies the points between and among which information will be transmitted?[76]

30. *For another*, Internet service providers routinely change the form or content of the information sent over their networks—for example, by using firewalls to block harmful content or using protocol processing to interweave IPv4 networks with IPv6 networks. The Commission has acknowledged that broadband Internet networks must be reasonably managed since at least the *2005 Internet Policy Statement*.[77] We believe that consumers want and pay for these functionalities that go

[73] In the past, rate-of-return carriers have offered broadband Internet access transmission service as a common-carriage last-mile service that transmits data between and end user and an ISP. *Wireline Broadband Classification Order*, 20 FCC Rcd at 14899–900, paras. 86–88. Absent an ISP at the other end, however, broadband Internet access transmission service only transmits data to a carrier's central office (or other aggregation point) as it does not itself offer the capabilities that come with Internet access.

[74] *Stevens Report*, 13 FCC Rcd at 11532, para. 64.

[75] *Title II Order*, 30 FCC Rcd at 5761–62, para. 361.

[76] We note that the *Title II Order* asserted that "It is not uncommon in the toll-free arena for a single number to route to multiple locations, and such a circumstance does not transform that service to something other than telecommunications." *Title II Order*, 30 FCC Rcd at 5761–62, para. 361. Despite that assertion, the Commission *has* expressly found that the management of toll-free numbers is "not a common carrier service" and that providers that manage toll-free numbers "do not need to be carriers." *800 Data Base Access Tariffs and the 800 Service Management System Tariff; Provision of 800 Services*, CC Docket Nos. 93-129, 86-10, Report and Order, 11 FCC Rcd 15227, 15248–49, paras. 44–45 (1996).

[77] *Internet Policy Statement*, 20 FCC Rcd at 14987, para. 5 & n.5.

beyond mere transmission—and that they have come to expect them as part and parcel of broadband Internet access service. We seek comment on our analysis. What constitutes a "change in the form" of information? If not the protocol-processing for internetworking—considered an enhanced service under the *Computer Inquiries*—how should we interpret this phase so it carries with it independent meaning and is not mere surplusage? How could we plausibly conclude that it is not a "change in the . . . content" to use of firewalls and other reasonable network management tools to shield broadband Internet users from unwanted intrusions and thereby alter what information reaches the user for the user's benefit? We seek comment on other ways in which Internet service providers change the form or content of information to facilitate a broadband Internet user's experience on line.

31. Other provisions of the Act appear to confirm our analysis that broadband Internet access services should be classified as information services. For instance, section 230 defines an interactive computer service to mean "*any information service*, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system *that provides access to the Internet* and such systems operated or services offered by libraries or educational institutions."[78] On its face, the plain language of this provision deems Internet access service an information service. We seek comment on this analysis, on the language of section 230, and on how it should impact our classification of broadband Internet access service.

32. Section 231 is even more direct. It expressly states that "Internet access service" "does not include telecommunications services." And it defines Internet access service as one offering many capabilities (like an information service): "a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers."[79] Although inserted into the Communications Act one year after the Telecommunications Act's passage[80] and previously interpreted to "clarify that section 231 was not intended to impair our or a state commission's ability to regulate basic telecommunications services,"[81] this language on its face makes clear that Internet access service is not a telecommunications service. We seek comment on this analysis, on the language of section 231, and on how it should impact our classification of broadband Internet access service.

33. The structure of Title II appears to be a poor fit for broadband Internet access service. In the *Title II Order*, the Commission, on its own motion, forbore either in whole or in part on a permanent or temporary basis from 30 separate sections of Title II as well as from other provisions of the Act and Commission rules.[82] The significant forbearance the Commission granted in in the *Title II Order* suggests the highly prescriptive regulatory framework of Title II is unsuited for the dynamic broadband Internet access service marketplace. We seek comment on this analysis, and on what weight we should give this analysis in examining the future of this model of regulation.

34. The purposes of the Telecommunications Act appear to be better served by classifying broadband Internet access service as an information service. Congress passed the Telecommunications

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[78] 47 U.S.C. § 230(f)(2).

[79] 47 U.S.C. § 231(e)(4).

[80] Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681–736, § 1403 (codified at 47 U.S.C. § 231).

[81] *Cable Modem Order*, 17 FCC Rcd at 4799, para. 1 & n.2.

[82] *See Title II Order*, 30 FCC Rcd at 5834, para. 486 (sections 254(d), (g), and (k)); 5825, para. 470 (section 225(d)(3)(B)); 5835, para. 488 (section 254(d)'s first sentence); 5841, para. 497 (section 203); 5845, para. 505 (section 204); 5845, para. 506 (section 205); 5846, para. 508 (sections 211, 213, 215, 218, 219, 220); 5847, para. 509–12 (section 214 except for subsection (e)); 5849, para. 513 (section 251 except for subsection (a)(2), section 256); 5852, para. 515 (section 258).

Act to "promote competition and reduce regulation"[83] and "[n]othing in the 1996 Act or its legislative history suggests that Congress intended to alter the current classification of Internet and other information services or to expand traditional telephone regulation to new and advanced services."[84] Or as Senator John McCain put it, "[i]t certainly was not Congress's intent in enacting the supposedly pro-competitive, deregulatory 1996 Act to extend the burdens of current Title II regulation to Internet services, which historically have been excluded from regulation."[85] Or as Congress codified its intent in section 230: It is the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[86] An information service classification would "reduce regulation" and preserve a free market "unfettered by Federal or State regulation"—but a telecommunications service classification would not. We seek comment on this analysis, as well as whether there are any other provisions of the Communications Act or Telecommunications Act that establish congressional intent with respect the appropriate regulatory framework for broadband Internet access services.

35. More broadly, we seek comment on the text, structure, and purposes of the Communications Act and the Telecommunications Act, as well as any additional facts about what Internet service providers offer, how broadband Internet access service works, and what broadband Internet users expect that might inform our analysis.

36. We seek special comment on two aspects of the *Title II Order*'s interpretation of the Act. First, the *Title II Order* claimed its interpretation sprang in part from a change in "broadband providers' marketing and pricing strategies, which emphasize speed and reliability of transmission separately from and over the extra features of the service packages they offer."[87] It claimed this marketing "leaves a reasonable consumer with the impression that a certain level of transmission capability—measured in terms of 'speed' or 'reliability'—is being offered in exchange for the subscription fee, even if complementary services are also included as part of the offer."[88] We note that even before the *Cable Modem Order*, the Commission recognized that Internet service providers marketed the speed of their connections.[89] We seek comment on whether Internet service providers' marketing has decidedly changed in recent decades.[90] More generally, we seek comment on the relevance of this argument. Neither statutory service definition speaks of speed or reliability, and there is little reason to think consumers might want a fast or reliable "transmission . . . of information" but not a fast or reliable "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information." Indeed, many of the advertisements discussed by the *Title II Order* speak directly to the capabilities offered through high-speed service.[91] We seek comment on this analysis and on any

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[83] Preamble, Telecommunications Act of 1996.

[84] *Five Senators Letter* at 1.

[85] *Stevens Report*, 13 FCC Rcd at 11519, para. 37 (quoting Letter from Senator John McCain to the Honorable William E. Kennard, Chairman, FCC).

[86] 47 U.S.C. § 230(b)(1).

[87] *Title II Order*, 30 FCC Rcd at 5743, para. 330.

[88] *Id.* at 5757, para. 354.

[89] *See, e.g.*, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Second Report, 15 FCC Rcd 20913, 20931, paras. 36–37 (2000).

[90] We note that in conducting its review of the changed circumstances, the D.C. Circuit concluded that there was no need to decide whether there really was anything new because the Commission in the *Title II Order* "concluded that changed factual circumstances were not critical to its classification decision." *USTelecom*, 825 F.3d at 709.

[91] *See, e.g.*, *Title II Order*, 30 FCC Rcd at 5756, para. 352.

other relevant facts regarding whether broadband Internet users receive the capabilities of an information service or the mere transmission between points of a user's choosing of a telecommunications service.

37. Second, the *Title II Order* found that DNS[92] and caching[93] used in broadband Internet access service were just used "for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[94] The Commission has previously held this category applies to "adjunct-to-basic" functions that are "incidental" to a telecommunications service's underlying use and "do not alter [its] fundamental character."[95] As such, these functions generally are not "useful to end users, rather than carriers."[96] We seek comment on how DNS and caching functions are now used, whether they benefit end users, Internet service providers, or both, and whether they fit within the adjunct-to-basic exception. How would broadband Internet access service work without DNS or caching? Would removing DNS have a merely incidental effect on broadband Internet users, or would it fundamentally change their online experience? Absent caching, would broadband Internet users that now expect high-quality video streaming see only incidental changes or more fundamental changes? Are there other ways that DNS or caching are used for "for the management, control, or operation of a telecommunications system"?

2. Commission Precedent Supports Classification as an Information Service

38. Our proposed classification of broadband Internet access service as an information service is firmly rooted in Commission precedent. For two decades, a consistent bipartisan framework supported a free and open Internet. That same consensus led to six separate Commission decisions confirming that Internet access service is an information service, subject to Title I. Chairman Kennard first led the FCC in determining that Internet access service is an information service in the *Stevens Report*.[97] Chairman Powell led the Commission to classify broadband Internet access service over cable systems as an information service in the *Cable Modem Order*.[98] Chairman Martin led the Commission to classify several broadband Internet access services as information services in the *Wireline Broadband Classification Order*,[99] the *BPL-Enabled Broadband Order*,[100] and the *Wireless Broadband Internet Access Order*.[101] Finally, Chairman Genachowski declined to reclassify broadband Internet access

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[92] *Title II Order*, 30 FCC Rcd at 5758, para. 356 & n. 972 (defining DNS as services "most commonly used to translate domain names, [into] numerical IP addresses that are used by network equipment to locate the desired content").

[93] *Id*. at 5757–58, para. 356 & n. 973 (defining caching as "the storing of copies of content at locations in a network closer to subscribers than the original source of the content [, which] enables more rapid retrieval of information from websites that subscribers wish to see most often").

[94] 47 U.S.C. § 153(24); *Title II Order*, 30 FCC Rcd at 5765–66, para. 366.

[95] *See North American Telecommunications Association Petition for Declaratory Ruling Under §64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, 101 FCC 2d 349, 359–61, paras. 24, 27, 28 (1985).

[96] *Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, As Amended, to Certain Activities, Bell Operating Companies*, CC Docket No. 96-149, Memorandum Opinion and Order, 13 FCC Rcd 2627, 2639, para. 18 (Com. Car. Bur. 1998).

[97] *See Stevens Report*, 13 FCC Rcd at 11503, para. 3.

[98] *See Cable Modem Order*, 17 FCC Rcd at 4802, para. 7.

[99] *Wireline Broadband Classification Order*, 20 FCC Rcd 14853.

[100] *BPL-Enabled Broadband Order*, 21 FCC Rcd at 13281

[101] *Wireless Broadband Internet Access Order*, 25 FCC Rcd 5901.

services in the *Open Internet Order*.[102]

39. We believe the Commission under Democratic and Republican leadership alike was correct in these decisions to classify broadband Internet access service as an information service and that, 20 years after the passage of the Telecommunications Act, we should be reluctant to second-guess the interpretations of those more likely to understand the contemporary meaning of the terms of the Telecommunications Act. We seek comment on our assessment. Did the Commission's historical information service classification better enable flexibility in marketplace offerings?[103] Did the regulatory certainty of maintaining the same regulatory environment for approximately three decades (since the *Computer Inquiries*) foster additional investment or innovative business models to benefit consumers? How should we evaluate the prior Commissions' predictions of intermodal competition given the 4,462 Internet service providers now in the market? How many providers would likely have entered the market if traditional Title II regulation had been the norm? What actual harms, if any, resulted from light-touch regulation?

40. The Commission has previously concluded that Congress formally codified information services and telecommunications services as two, mutually exclusive types of services in the Telecommunications Act.[104] The *Title II Order* did not appear to disagree with this analysis, finding that broadband Internet access service was a telecommunications service and *not* an information service.[105] We believe this conclusion regarding mutual exclusivity is correct based on the text and history of the Act. We seek comment on this analysis.

41. The Commission has previously found that Congress intended the definitions of information service and telecommunications service in the Act to parallel those definitions in the MFJ and in the *Computer Inquiries*.[106] The *Title II Order* apparently accepted these parallels.[107] We thus seek comment on any evidence that the court in the MFJ thought that Internet access service was a telecommunications service. Did the court and the Department of Justice intend to exclude Internet access services from the prohibitions on what Bell Operating Companies could offer? Did the court and the Department of Justice intend for Internet access services to be regulated via tariff (as other telecommunications services were)? We similarly seek comment on any evidence that the Commission in the *Computer Inquiries* thought that Internet access service was a basic service. Did the Commission intend for facilities-based carriers to offer Internet access service without the protections of the *Computer Inquiries* (as they could for basic services)? The Supreme Court has said that statutory interpretation "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."[108] How is that canon relevant here?

42. Finally, the *Title II Order* deviated further from Commission precedent to extend its

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[102] *Open Internet Order*, 25 FCC Rcd at 17933, paras. 47-48.

[103] *See, e.g., Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14891-92, para. 72 (eliminating the *Computer Inquiries* requirement to offer broadband transmission on a common carrier basis "will make it more likely that wireline network operators will take more risks in investing in and deploying new technologies than they are willing and able to take under the existing regime"); *Stevens Report*, 13 FCC Rcd at 11524, para. 46 ("the Commission concluded in *Computer II*" that "regulatory freedom . . . was important to the healthy and competitive development of the enhanced-services industry").

[104] *See Stevens Report*, 11 FCC Rcd at 11522–23, para. 43; *see also* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), as amended.

[105] *Title II Order*, 30 FCC Rcd at 5763–64, paras. 363–65.

[106] *Stevens Report*, 11 FCC Rcd at 11521–22, para. 42.

[107] *Title II Order*, 30 FCC Rcd at 5736, para. 312.

[108] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

authority to Internet traffic exchange or "interconnection,"[109] an area historically unregulated and beyond the Commission's reach. We believe Internet traffic exchange, premised on privately negotiated agreements or case-by-case basis, is not a telecommunications service. Moreover, we find nothing in the Act that would extend our jurisdiction as previously suggested by the *Title II Order*. We further do not believe there exists any non-Title II basis for the Commission to exercise ongoing regulatory oversight over Internet traffic exchange. We accordingly propose to relinquish any authority over Internet traffic exchange. We seek comment on the consequences and implications of the relinquishing the Commission's regulatory authority in this manner.

43. We note that the Commission's *Title II Order* also went well beyond agency precedent in important ways. For instance, the Commission did not limit its analysis to the "last mile" connections at issue in the *Brand X* and the FCC's underlying proceeding in that case. Rather, the Commission's *Title II Order* defined Internet access service as extending far deeper into the network. We seek comment on the significance of this expansive departure from agency precedent.

3. Public Policy Supports Classification as an Information Service

44. The Commission's decision to reclassify broadband Internet access service as a telecommunications service subject to Title II regulation has resulted in negative consequences for American consumers—including depressed broadband investment and reduced innovation because of increased regulatory burdens and regulatory uncertainty stemming from the rules adopted under Title II. As providers have devoted more resources to complying with new regulations, the threat of regulatory enforcement of vague rules and standards has dampened providers' incentive to invest and innovate. Additionally, although reclassifying broadband Internet access service as a telecommunications service has led to significant regulatory burdens, it has not solved any discrete, identifiable problems. Restoring broadband Internet access service to its previous status as an information service subject to Title I is in the public interest because it will alleviate the harms caused by Title II reclassification. We seek detailed comment on this analysis below.

45. Following the *2014 Notice* and in the lead up to the *Title II Order*, Internet service providers stated that the increased regulatory burdens of Title II classification would lead to depressed investment.[110] Recent data indicate how accurate those predictions were. A recent study indicates that capital expenditure from the nation's twelve largest Internet service providers has fallen by $3.6 billion, a 5.6% decline relative to 2014 levels.[111] Another study indicated that between 2011 and 2015, the threat of reclassification reduced telecommunications investment by about 20–30%, or about $30–40 billion

[109] *Title II Order*, 30 FCC Rcd at 5960–61, 63, paras. 200, 203.

[110] *See, e.g.*, ACA Comments at 60–66; Alcatel-Lucent Comments at 2; AT&T Comments at 51-53; CenturyLink Comments at 5-6; Charter Comments at 13, 15-16; Cisco Comments at 27; Comcast Comments at 46-50; Cox Comments at 34-36; CTIA Comments at 46-48; Ericsson Comments at 12; Frontier Comments at 2-4; Qualcomm Comments at 4-7; Verizon Comments at 57; Letter from Matthew A. Brill, Counsel for National Cable & Telecommunications Association, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 3-5 (Dec. 23, 2014); Letter from Patrick S. Brogan, USTelecom to Marlene Dortch, Secretary, FCC, GN Docket No. 14-28 (Nov. 19, 2014) (attaching Kevin A. Hassett & Robert J. Shapiro, Sonecon, The Impact of Title II Regulation of Internet Providers on Their Capital Investment (Nov. 2014)); Letter from Laurence Brett Glass, d/b/a LARIAT to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 1 (Jan. 9, 2015); Letter from John Mayo, Exec. Director, Georgetown Center for Business and Public Policy to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (Jan. 16, 2015) (attaching Anna-Maria Kovacs, Regulatory Uncertainty: The FCC's Open Internet Docket (Jan. 2015)); Martin H. Thelle & Dr. Bruno Basalisco, Copenhagen Economics, Europe Can Catch Up With the US: A Contrast of Two Contrary Broadband Models (June 2013), *available at* http://bit.ly/1zJritJ.

[111] Hal Singer, *2016 Broadband Capex Survey: Tracking Investment in the Title II Era* (Mar. 1, 2016) https://haljsinger.wordpress.com/2017/03/01/2016-broadband-capex-survey-tracking-investment-in-the-title-ii-era.

annually.[112] Other sources also explain that other countries' experiences should caution the United States that ongoing utility-style regulation should be expected to have even more dramatic impacts on investment beyond what has already occurred.[113] Other interested parties have come to different conclusions.[114]

46. We believe that these reduced expenditures are a direct and unavoidable result of Title II reclassification, and exercise our predictive judgment that reversing the Title II classification and restoring broadband Internet access service to a Title I service will increase investment. Among other things, Internet service providers have finite resources, and requiring providers to divert some of those resources to newly imposed regulatory requirements adopted under Title II will, unsurprisingly, reduce expenditures that benefit consumers. We seek comment on how the burdens associated with Title II regulation have impacted broadband investment and, as a result, consumers. Has the Commission's increased regulation of broadband adversely impacted broadband investment and innovation? What impact has Title II reclassification had on providers' business models, including any lost opportunity costs, and how has this impact has been passed on to consumers? Is there any evidence that increased regulation has promoted broadband investment, as some claim? What are the long-term implications of utility-style regulation respect to capital expenditures on high-speed networks?

47. We also seek specific comment on how the classification of broadband Internet access service as a telecommunications service has impacted smaller broadband Internet access service providers, many of whom lack the dedicated compliance staffs and financial resources of the nation's largest providers. Before the Commission adopted the *Title II Order*, many small providers made it clear that reclassification would harm their businesses and the customers they serve.[115] Since reclassification, small providers have been forced to reduce their investment and halt the expansion of their networks, and slow, if not delay the development and deployment of innovative new offerings.[116] For example, one

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[112] *See* George S. Ford, Net Neutrality, Reclassification and Investment: A Counterfactual Analysis, Phoenix Center for Advanced Legal & Economic Public Policy Studies, Perspectives 17-02, at 2, http://www.phoenix-center.org/perspectives/Perspective17-02Final.pdf.

[113] Patrick Brogan, USTelecom, Utility Regulation and Broadband Network Investment: The EU and US Divide, Research Brief (Apr. 25, 2017), *available at* https://www.ustelecom.org/sites/default/files/documents/Utility%20Regulation%20and%20Broadband%20Investment.pdf.

[114] *See, e.g.*, *Free Press*, Internet Service Providers' Capital Expenditures (Feb. 28, 2017), https://www.freepress.net/sites/default/files/resources/internet_service_providers_capital_expenditures_2013-2016_reported_as_of_2_27_17.pdf (noting a decrease in investment from 2015 to 2016, but claiming an increase in investment in the 2-year period of 2015–16 compared to 2013–14). We observe, however, that these figures showing increased investment do not incorporate the generally accepted accounting practice of maintaining consistency over time, as they include AT&T's foreign capital expenditures in Mexico as well as expenditures related to DirectTV, see Hal Singer, Tracing AT&T's Capital Expenditures Over Time, https://haljsinger.wordpress.com/2017/02/10/tracing-atts-capital-expenditure-over-time/, and do not adjust for Sprint's changed accounting treatment of leased handset devices from an operating expense to a capital expense. *See* Hal Singer, 2016 Broadband Capex Survey: Tracking Investment in the Title II Era, https://haljsinger.wordpress.com/2017/03/01/2016-broadband-capex-survey-tracking-investment-in-the-title-ii-era/.

[115] Letter from Barbara S. Esbin, Counsel, American Cable Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 14-28, at 2–5 (filed Feb. 2, 2015) (Detailing how smaller Internet providers, such as Cedar Falls (IA) Utility already abided by Open Internet principles, but the added cost of defending its " practices, rates, terms and conditions of service" would be prohibitively expensive) (ACA *Ex Parte*); Letter from 43 Small ISPs to Chairman Wheeler, GN Docket Nos. 14-28, 10-127, at 1–2 (filed Feb. 10, 2015) (explaining that Title II regulation will raise costs and hinder broadband deployment, and create "deep and lasting regulatory uncertainty").

[116] *See, e.g.*, Letter from Herb Longware, President, Cable Communications of Willsboro, Inc. et al. to Hon. Ajit Pai, Chairman, FCC, GN Socket No. 14-28, WC Docket No. 16-106, at 2 (filed Apr. 25, 2017) (Letter from 22 Small ISPs); Petition of American Cable Association and National Cable & Telecommunications Association For Stay

small ISP had planned to "triple the number of new base stations" that would be deployed each month to provide fixed wireless broadband service to new customers, but put those plans on hold as a result of the Commission's reclassification decision had for to put those plans on hold.[117] Other small providers have had to modify or abandon altogether past business models to account for increased compliance costs and depressed investment from outside investors.[118] This depressed investment has had particularly strong impacts on the deployment of broadband to previously unserved and rural areas.[119] What other impacts have small providers felt as a result of reclassification? Have there been any corresponding benefits for small providers?

48. In addition to imposing significant regulatory costs on Internet service providers, Title II reclassification created significant regulatory uncertainty. USTelecom specifically identified "regulatory uncertainty" as one of the causes of reduced investment.[120] Regulatory uncertainty may have particularly significant effects on small Internet service providers, which may be poorly equipped to address the legal, technical, and financial burdens associated with an uncertain regulatory environment.[121] That uncertainty has directly led to reduced investment, which has harmed consumers.[122] We seek comment on what other effects regulatory uncertainty has had on broadband Internet access service providers' investment decisions.

49. We also seek comment on other consumer benefits that would result from restoring broadband Internet access service classification to an information service, rather than subjecting these

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Pending Judicial Review, GN Docket No. 14-28, Attach. 4, at 1–2 (Declaration of Michael Jensen, General Manager of Bagley, MN Public Utilities) (noting that Bagley Utilities offers broadband Internet access service to about 450 customers, and it has 7 full-time employees, and stating that in the past 3 years the company had invested approximately $400,000 in its network, but that those investments are now likely to be curtailed due to the effects of Title II reclassification).

[117] *See, e.g.*, Joint Petition For Stay of United States Telecom Association, CTIA, AT&T Inc., Wireless Internet Service Providers Association, and CenturyLink, GN Docket No. 14-28, Exh. 1, at 5–6 (Declaration of Nathan Stooke, Founder and CEO of Wisper ISP, Inc.) (filed May 1, 2015) (Joint Stay Petition).

[118] *See* Letter from 22 Small ISPs at 2 (explaining that the mere threat that the Commission may impose rate regulation affects small ISPs' ability to obtain financing); Joint Stay Petition, Exh. 5, at 4 (Declaration of Clay Stewart, CEO of SCS Broadband) (explaining that investors have already told SCS Broadband, a small ISP that "projects that were viable investments under the regime that existed before the [*Title II Order*] will no longer provide the necessary returns to justify the investment"); Joint Stay Petition, Exh. 6, at 4 (Declaration of Forbes H. Mercy, President of Washington Broadband, Inc.) (explaining that the *Title II Order* has forced Washington Broadband, Inc., a small ISP to give up its existing business model of constructing new towers that cover small areas based on a return on investment model of light density return).

[119] Joint Stay Petition, Exh. 2, at 6 (Declaration of L. Elizabeth Bowles, President and Chairman of Aristotle Inc.) (explaining that Aristotle Inc., a small ISP in Arkansas, dialed back its plans to triple its customer base and expand service into unserved areas of rural Arkansas as a result of the *Title II Order*); Joint Stay Petition, Exh. 6, at 4 (Declaration of Forbes H. Mercy, President of Washington Broadband, Inc.) (explaining that the *Title II Order* has forced Washington Broadband, Inc., a small ISP, to scale back expansion to new, unserved, or underserved areas).

[120] US Telecom, *Broadband Investment Remains Large, but Ticked Down in 2015* (Dec. 14, 2016), https://www.ustelecom.org/news/press-release/broadband-investment-remains-large-ticked-down-2015.

[121] *See, e.g.*, Petition of American Cable Association and National Cable & Telecommunications Association For Stay Pending Judicial Review, GN Docket No. 14-28, Attach. 1, at 1 (Declaration of William D. Bauer, CEO of WinDBreak Cable) (noting that WinDBreak offers BIAS to about 440 customers, and it has 10 employees) (filed May 1, 2015) (ACA Stay Petition).

[122] *See, e.g.*, Joint Stay Petition, Exh. 1, at 5–6 (Declaration of Nathan Stooke, Founder and CEO of Wisper ISP, Inc.) (noting that Wisper had planned to "triple the number of new base stations" that would be deployed each month to provide fixed wireless broadband service to new customers, but the Commission's reclassification decision had forced Wisper to put those plans on hold).

services to utility-style regulation. We note that increased investment is likely to lead to a faster closing of the digital divide for rural and low-income consumers, higher speeds and more competition for all consumers, as well as more affordable prices. We seek comment on the magnitude of these effects, and what further steps the Commission should take to maximize facilities-based investment and competition. Specifically, we seek comment on the trade-offs from changing the classification status. We also seek comment more broadly on the effects on innovation of regulatory uncertainty, and other examples of reduced innovation from Internet service providers as a result of the Title II classification.

50. We also seek comment on specific ways in which consumers were harmed under the light-touch regulatory framework that existed before the Commission's *Title II Order*. Much of the *Title II Order* focused extensively on hypothetical actions Internet service providers "might" take, and how those actions "might" harm consumers,[123] but the *Title II Order* only articulated four examples of actions Internet service providers arguably took to justify its adoption of the Internet conduct standard under Title II.[124] Do these isolated examples justify the regulatory shift that Title II reclassification entailed? Do such isolated examples constitute market failure sufficient to warrant pre-emptive, industry-wide regulation? Were pre-existing federal and state competition and consumer protection regimes, in addition to private sector initiatives, insufficient to address such isolated examples, and if so, why? What are the costs and benefits of pre-emptive, industry-wide regulation in such circumstances? In particular, does that approach deter competition and competitive entry, and does it have unintended consequences with respect to infrastructure investment? Do those unintended consequences outweigh any purported benefits in addressing such isolated cases pre-emptively? Is there evidence of actual harm to consumers sufficient to support maintaining the Title II telecommunications service classification for broadband Internet access service? Is there any evidence that the likelihood of these events occurring decreased with the shift to Title II?

51. Conversely, what, if any, changes have been made as a result of Title II reclassification that have had a positive impact on consumers? Was Title II reclassification necessary for any of those changes to occur? Is there any evidence, for example, that consumers' online experiences and Internet access have improved due to policies adopted in the *Title II Order*?

4. The Commission has Legal Authority to Classify Broadband Internet Access Service as an Information Service

52. As the D.C. Circuit has held, "[i]t is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress."[125] And that authority is not unbounded. The Commission has authority, as the Supreme Court recognized in *Brand X*, to interpret the Communications Act, including ambiguous definitional provisions.[126] However, when interpreting a statute it administers, the Commission, like all agencies, "must operate 'within the bounds of reasonable interpretation.' And reasonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'"[127]

[123] *See, e.g., Title II Order*, 30 FCC Rcd at 5652, para. 121 ("the no-blocking rule will not be as effective because broadband providers might otherwise engage in conduct that harms the open Internet but falls short of outright blocking"); at 5656, para. 127 ("because of the very real concerns about the chilling effects that preferential treatment arrangements could have on the virtuous cycle of innovation, consumer demand, and investment, we adopt a bright-line rule banning paid prioritization arrangements").

[124] *See Title II Order*, 30 FCC Rcd at 5620, 5628, para. 65 & n. 69 (discussing the *Comcast* and *Madison River* proceedings), para. 79 & n. 123 (discussing AT&T blocking FaceTime and Comcast exempting its video service from data caps when streamed over an Xbox).

[125] *American Library Ass'n v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005).

[126] *Brand X*, 545 U.S. at 980-81.

[127] *Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427, 2442 (2014) (*Utility Air*).

53. An agency also is free to change its approach to interpreting and implementing a statute so long as it acknowledges that it is doing so and justifies the new approach.[128] Evaluating the change in regulatory approach in the *Title II Order*, the D.C. Circuit majority in *USTelecom* applied a "highly deferential standard" to the agency's predictive judgments regarding the investment effects of reclassification,[129] and deferred to the Commission's "'evaluat[ion of] complex market conditions'" underlying its rejection of providers' reliance interests in the prior classification.[130] D.C. Circuit precedent also recognizes, however, that should the Commission's predictions "prove erroneous, the Commission will need to reconsider" the associated regulatory actions "in accordance with its continuing obligation to practice reasoned decision-making."[131] We believe that the Commission's predictions and expectations regarding broadband investment and the nature and effects of reclassification on the operation of the marketplace were mistaken and have not been borne out by subsequent events. Moreover, we believe that a restoration of the information-service classification for broadband Internet access service is likely to increase infrastructure investment. In such a case, principles of administrative law give us more than ample latitude to revisit our approach. We seek comment on this overall approach, and we seek comment on these specific issues in the sections below.

54. Even more fundamentally, we believe that the Commission's statutory interpretation in the *Title II Order* did not adequately reflect proper standards of statutory construction, and that classifying broadband Internet access service as an information service is the better reading of the statute, independent of the factual developments subsequent to the *Title II Order*. We note that the Supreme Court has expressly upheld the Commission's prior information service classification.[132] We seek comment on this analysis. Although the *Title II Order*'s telecommunications service classification was upheld in *USTelecom*, the court emphasized that it "'sit[s] to resolve only legal questions presented and argued by the parties,'" and not "'arguments a party could have made but did not.'"[133] Many arguments as to why an information service classification of broadband Internet access service reflects the better reading of ambiguous provisions of the Act were not addressed by the court because the arguments were raised in support of a claim that the Act unambiguously required a particular service classification.[134] Thus, although we are in any case free to revisit previously affirmed interpretations of ambiguous statutory language, we note that the *USTelecom* decision did not reach many aspects of the statutory analysis we propose here. We seek comment on this analysis and on our reasoning that the statutory

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[128] *See, e.g., FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009) (*Fox*); *Mary V. Harris Found. v. FCC*, 776 F.3d 21, 24-25 (D.C. Cir. 2015).

[129] *USTelecom*, 825 F.3d at 707.

[130] *Id*. at 710 (quoting *Gas Transmission Northwest Corp. v. FERC*, 504 F.3d 1318, 1322 (D.C. Cir. 2007)).

[131] *Aeronautical Radio v. FCC*, 928 F.2d 428, 445 (D.C. Cir. 1991). *See also, e.g., American Family Ass'n v. FCC*, 365 F.3d 1156, 1166 (D.C. Cir. 2004) ("[T]he FCC's 'necessarily wide latitude to make policy based on predictive judgments deriving from its general expertise implies a correlative duty to evaluate its policies over time to ascertain whether they work—that is, whether they actually produce the benefits the Commission originally predicted they would.'") (quoting *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993)).

[132] *Brand X*, 545 U.S. at 986.

[133] *USTelecom*, 825 F.3d at 697 (citations omitted).

[134] Or, in other cases they were not addressed at all. *See, e.g., id*. at 701–04 (rejecting arguments that information service classification was unambiguously required based on the text, structure and purpose of the Act); *id*. at 710–11 (highlighting the limited ways in which USTelecom challenged the *Title II Order* for failing to demonstrate that the *NARUC* test from common carriage was met); *id*. at 717–18 (rejecting arguments that the statute completely precludes the Commission from defining "public switched network" more broadly than the public switched telephone network); *id*. at 721 (rejecting arguments that the statute necessarily compels the Commission to distinguish between "mobile broadband alone enabling a connection" and "mobile broadband enabling a connection through use of adjunct applications such as VoIP").

interpretation proposed in this Notice more faithfully adheres to the Act and reflects the better reading of the relevant provisions than the views adopted in the *Title II Order*.

B. Reinstating the Private Mobile Service Classification of Mobile Broadband Internet Access Service

55. We propose to classify all broadband Internet access services—both fixed and mobile—as information services. With respect to mobile broadband Internet access service, we further propose to return it to its original classification as a private mobile service, and in conjunction to revisit the elements of the *Title II Order* that modified or reinterpreted key terms in section 332 of the Act and our implementing rules. We seek comment on that proposal, including on the specific issues discussed below. We also generally seek comment on whether certain and, if so, which, aspects of the D.C. Circuit's analysis of mobile broadband Internet access service in *USTelecom* necessitate modifications or additions to the Commission's proposals with respect to mobile broadband Internet access service here.[135]

56. We propose to restore the meaning of "public switched network" under section 332(d)(2) to its pre-*Title II Order* focus on the traditional public switched telephone network.[136] We find persuasive the Commission's reasoning when originally adopting the prior definition,[137] which also appears more consistent with the historical usage of the term "public switched network,"[138] appears to better accord with the text of section 332(d)(2) by clearly covering only a single, integrated network,[139] and was not disturbed by Congress in amendments to section 332 of the Act.[140] We seek comment on this analysis and our proposed approach.

57. We also propose to return to our prior definition of "interconnected service" by restoring the word "all" in the codified definition.[141] Although the court in *USTelecom* found the deletion of "all" to be "of no consequence" to the reclassification of mobile broadband Internet access service, it did so based on an argument that the Commission never mentioned in its brief—namely, that mobile broadband users can reach telephone customers "via VoIP" and that this determination is sufficient (regardless of the deletion of the word "all") to render mobile broadband Internet access service interconnected with the public switched network.[142] We seek comment on that view and whether the Commission erred in 2015 by modifying the definition based on the view that two separate networks can be interconnected if they do not allow all users to communicate with each other. The FCC's prior decision in this respect appears to run contrary to the focus on a single, integrated network that we believe Congress likely intended in

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[135] *See generally USTelecom*, 825 F.3d at 716–26 (addressing arguments regarding the *Title II Order*'s treatment of mobile broadband Internet access service).

[136] *See* 47 CFR § 20.3 (2014) (defining "public switched network").

[137] *See, e.g., Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1434, 1436–37, paras. 53, 59 (1994).

[138] *See, e.g., Applications of Winter Park Tel. Co.*, Memorandum Opinion and Order, 84 FCC 2d 689, 690, para. 2, n.3 (1981); *Ad Hoc Telecommunications Users Committee v. FCC*, 680 F.2d 790, 793 (D.C. Cir. 1982); *Amendment of Part 22 of the Commission's Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service*, Report and Order, 7 FCC Rcd 719, 720, para. 9 (1992); *Provision of Access for 800 Service*, Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5421, 5421 & n.3 (1991); *Telecommunications Services for Hearing-Impaired and Speech-Impaired Individuals, and the Americans with Disabilities Act of 1990*, Notice of Proposed Rulemaking, 5 FCC Rcd 7187, 7190, para. 20 (1990).

[139] *See* 47 U.S.C. § 332(d)(2) (referring to "the" public switched network).

[140] *See, e.g.*, Telecommunications Act of 1996, Pub. L. No. 104-104, § 704(b) (1996) (amending section 332 of the Communications Act).

[141] *See* 47 CFR § 20.3 (2014) (defining "interconnected service").

[142] *See USTelecom*, 825 F.3d at 718–27.

section 332(d)(2).[143] We seek comment on these views. In the *Title II Order*, the Commission noted that the prior definition of "interconnected service" would encompass a service that "provides general access to points on the PSN [but] also restricts calling in certain limited ways" (such as blocking of 900 numbers), but cited no evidence that the prior definition led to any confusion.[144] We question the need for changes to the prior definition to account for that nuance, but nonetheless seek comment on whether modified rule language is warranted, and if so, what language targeted narrowly to that issue should be incorporated.

58. We also seek comment on whether any other interpretations of section 332 or our implementing rules from the *Title II Order* should be revisited here in connection with our proposed classification of mobile broadband Internet access service. For example, would a narrower interpretation of "capability" for purposes of the definition of "interconnected service" under our rules be warranted based on the Act or the regulatory history of that language? Are there other interpretations that should be reconsidered? In addition to the changes to the definitions in section 20.3 of the rules discussed above, would any additional changes to our codified rules be warranted?

59. In applying the definitions and interpretations of key terms in section 332 and our implementing rules under the proposals above, we also propose to reach the same conclusions regarding the application of those terms to mobile broadband Internet access service as we did in the *Wireless Broadband Order*.[145] We seek comment on that proposal and whether there have been any material changes in technology, the marketplace, or other facts that would warrant refinement or revision of any of that analysis.

60. Furthermore, insofar as mobile broadband Internet access service is best interpreted to be an information service, we believe that likely also would counsel in favor of classifying it as a private mobile service to avoid the inconsistency of the service being both an information service and a common carrier service. The Commission explained this reasoning when originally classifying mobile broadband Internet access service as both an information service and a private mobile service, and we propose to apply that same reasoning again here.[146] We seek comment on this proposal.

61. We also tentatively conclude that mobile broadband Internet access service is not the "functional equivalent" of commercial mobile service, and seek comment on that view. The Commission previously has observed, in light of Congress's determinations in section 332, that "very few mobile services that do not meet the definition of CMRS will be a close substitute for a commercial mobile radio service."[147] By contrast, we are concerned that the *Title II Order*'s test, which focuses on whether the service merely "enables ubiquitous access to the vast majority of the public," would eviscerate the statutory scheme.[148] We believe that the standard for demonstrating functional equivalency under our rules is instead more likely to properly implement section 332(d)(3) of the Act, and we thus propose to

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[143] Had all the elements of the *Title II Order*'s mobile broadband Internet access service classification remained, a future Commission might have incentives to adopt such an approach to avoid the potentially absurd result that traditional wireless voice service no longer constituted commercial mobile service. While not finding it a sufficient basis to reject the *Title II Order*'s treatment of mobile broadband Internet access service, the D.C. Circuit acknowledged the possibility that the revised definition of public switched network raised questions about whether traditional wireless voice service was sufficiently interconnected with the public switched network to still constitute a commercial mobile service. *See USTelecom*, 825 F.3d at 722.

[144] *Title II Order*, 30 FCC Rcd at 5787, para. 402 & n.1172 (internal quotations and citation omitted).

[145] *Wireless Broadband Order*, 22 FCC Rcd at 5915–18, paras. 37–45.

[146] *Id.* at 5919–21, paras. 48–56.

[147] *CMRS Second Report and Order*, 9 FCC Rcd at 1447, para. 79.

[148] *See Title II Order*, 30 FCC Rcd at 5790, para. 407.

reconsider the *Title II Order*'s position that the Commission is free to depart from that standard.[149] In addition, the *Title II Order* made no claim that the functional equivalency standard in our rules was met by mobile broadband Internet access service, and we similarly propose here that it does not meet that standard. We seek comment on these proposals.

62. Given the apparent historical success of the wireless marketplace prior to the *Title II Order*, we anticipate that returning mobile broadband Internet access service to its original classification of private mobile service and restoring prior definitions and interpretations of key concepts in section 332 is likely to substantially benefit the wireless marketplace and consumers and have few, if any, policy disadvantages. We seek comment on this view. To the extent any commenters believe that these proposals will have negative policy consequences, we seek specific information regarding the scope or significance of any such consequences and whether they can be mitigated in whole or in part through modifications to our proposals.

C. Effects on Regulatory Structures Created by the *Title II Order*

63. The *Title II Order* imposed additional regulatory frameworks under Title II, including forbearance and privacy. We seek comment on how we should treat those structures and proceedings moving forward.

64. *Forbearance.* If we adopt our lead proposal to remove the Title II reclassification of broadband Internet access service, what effect does that action have on the provisions of the Act from which the Commission forbore in the *Title II Order*? We believe that restoring the classification status of broadband Internet access service to an information service will render any additional forbearance moot in most cases. We seek comment on this analysis. At the same time, we seek comment on whether, with respect to broadband Internet access service, the Commission should maintain and extend forbearance to even more provisions of Title II as a way of further ensuring that our decision in this proceeding will prove to reduce regulatory burdens.

65. We also seek comment on the effect of reinstating an information service classification on providers that voluntarily offered broadband transmission on a common carrier basis under the *Wireline Broadband Classification Order* framework.[150] The *Title II Order* allowed such providers to opt-in to the *Title II Order*'s forbearance framework.[151] Should providers voluntarily electing to offer broadband transmission on a common carrier basis be able to do so under the *Title II Order*'s forbearance framework if we reclassify broadband Internet access service as an information service? If not, what transition mechanisms are required for such providers that opted-in to the *Title II Order*'s forbearance framework to enable them to revert back to the *Wireline Broadband Classification Order* framework? Should we extend forbearance to any other rules or statutory provisions for carriers that choose to offer broadband transmission on a common carrier basis?

66. *Section 222 Regulations.* Historically, the Federal Trade Commission (FTC) protected the privacy of broadband consumers, policing every online company's privacy practices consistently and initiating numerous enforcement actions.[152] When the Commission reclassified broadband Internet access service as a common carriage telecommunications service in 2015, however, that action stripped FTC authority over Internet service providers because the FTC is prohibited from regulating common

[149] 47 CFR § 20.9(a)(14).

[150] *Wireline Broadband Classification Order*, 20 FCC Rcd at 14900-03, paras. 89-95.

[151] *Title II Order*, 30 FCC Rcd at 5819, para. 460 & n.1378.

[152] *See* 15 U.S.C. § 45(a)(1) (prohibiting unfair or deceptive acts or practices in or affecting commerce); *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106, Report and Order, 31 FCC Rcd 13911,13945 para. 87 (2016) (*2016 Privacy Order*) ("the FTC has brought over 500 cases protecting the privacy and security of consumer information").

carriers.[153] To address the gap created by the Commission's reclassification of broadband Internet access service as a common carriage service, the *Title II Order* called for a new rulemaking to apply section 222's customer proprietary network information provisions to Internet service providers.[154] In October 2016, the Commission adopted rules governing Internet service provider's privacy practices and applied the rules it adopted to other providers of telecommunications services.[155] In March 2017, Congress voted under the Congressional Review Act (CRA) to disapprove the Commission's *2016 Privacy Order,* which prevents us from adopting rules in substantially the same form.[156]

67. We propose to return jurisdiction over Internet service providers' privacy practices to the FTC, with its decades of experience and expertise in this area.[157] We seek comment on this proposal.

68. *Lifeline*. We propose to maintain support for broadband in the Lifeline program after reclassification. In the *Universal Service Transformation Order*, the Commission recognized that "[s]ection 254 grants the Commission the authority to support not only voice telephony service but also the facilities over which it is offered"[158] and "allows us to . . . require carriers receiving federal universal service support to invest in modern broadband-capable networks."[159] Accordingly, as the Commission did in the *Universal Service Transformation Order*, we propose requiring Lifeline carriers to use Lifeline support "for the provision, maintenance, and upgrading" of broadband facilities capable of providing supported services.[160] We seek comment on this proposal. We also seek comment on any rule changes necessary to effectuate this change in our underlying authority to support broadband for low-income individuals and families.

69. *Other*. Beyond the issues raised above, we seek comment on the impact of reclassification on other Commission proceedings and proposals. For instance, how should we take into account our proposed reclassification in our proposals with respect to pole attachments and our inquiries

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[153] *See* 15 U.S.C. §§ 45(a)(2) (exempting "common carriers subject to the Acts to regulate commerce"), 44 (defining "Acts to regulate commerce" as including "the Communications Act of 1934 and all Acts amendatory thereof and supplementary thereto"); 47 U.S.C. § 153(51) (providing that "[a] telecommunications carrier shall be treated as a common carrier under [the Communications Act] only to the extent that it is engaged in providing telecommunications services"). One Ninth Circuit case has held that the common carrier exemption precluded FTC oversight of BIAS providers that otherwise were common carriers with respect to non-BIAS services. *See FTC v. AT&T Mobility LLC*, 835 F.3d 993 (9th Cir. 2016). The FTC has sought rehearing of that case *en banc*, which the Commission has supported. *See Amicus Curiae* Brief of the Federal Communications Commission In Support of the Federal Trade Commission's Petition For Rehearing *En Banc*, *FTC v. AT&T Mobility LLC*, No. No. 3:14-cv-04785-EMC (9th Cir. filed Oct. 24, 2016); Letter Pursuant to Fed R. App. P 28(j) of *amicus* FCC, *FTC v. AT&T Mobility LLC*, No. 15-16585 (9th Cir. Apr. 21, 2017). To the extent that issue ultimately were resolved favorably for the FTC, the Commission's reclassification of broadband Internet access service as a common carrier would remain a constraint on the extent to which the FTC could oversee the conduct of Internet service providers.

[154] *Title II Order*, 30 FCC Rcd at 5820, para. 462.

[155] *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106, Report and Order, 31 FCC Rcd 13911 (2016) (*2016 Privacy Order*).

[156] 5 U.S.C. §801(b)(2) ("A rule that [was disapproved under the CRA] may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule").

[157] *See* 5 U.S.C. § 801; Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, Pub. L. No. 115-22, 131 Stat 88 (enacting S.J. Res. 34, 115th Cong. (2017)).

[158] *Connect America Fund*, 26 FCC Rcd. 17663, 17685, para. 64 (2011) (*Universal Service Transformation Order*).

[159] *Id.* at 17686, para. 65.

[160] *See* 47 U.S.C. § 254(e).

with respect to preemption under Section 253 of the Act?[161] How should the Broadband Deployment Advisory Committee factor in the reduced regulatory burdens and increased investment that we anticipate will flow from reclassification?[162] We encourage commenters to offer specific recommendations as to how we can leverage our proposed reclassification in other proceedings to further encourage broadband deployment to all Americans.

IV. A LIGHT-TOUCH REGULATORY FRAMEWORK

70. Proposing to restore broadband Internet access service to its long-established classification as an information service reflects our commitment to a free and open Internet. Indeed, our lead proposal reaffirms the long-standing, bipartisan consensus begun in the Clinton Administration by restoring the Internet to the dynamic state that allowed it to flourish prior to the *Title II Order*. To determine how to best honor our commitment to restoring the free and open Internet, we propose re-evaluating the Commission's existing rules and enforcement regime to analyze whether *ex ante* regulatory intervention in the market is necessary. To the extent we decide to retain any of the Commission's *ex ante* regulations, we seek comment on whether, and how, we should modify them, specifically considering different approaches such as self-governance or *ex post* enforcement that may effectuate our goals better than across-the-board rules. Finally, we discuss the Commission's legal authority to adopt rules governing Internet service provider practices.

A. Re-evaluating the Existing Rules and Enforcement Regime

71. Below, we explore the best method to restore the long-standing consensus under both Democratic and Republican-led Commissions, represented by the four Internet Freedoms, that consumers should have access to the content, applications, and devices of their choosing as well as meaningful information about their service, all without deterring the investment and innovation that has allowed the Internet to flourish. We examine these freedoms and the Commission's current rules related to them, and for each, ask whether we should keep, modify, or eliminate them.

1. Eliminating the Internet Conduct Standard

72. In the *Title II Order*, the Commission created a catch-all standard intended to prohibit "current or future practices that cause the type of harms [the Commission's] rules are intended to address."[163] This standard allows the Commission to prohibit practices that it determines unreasonably interfere with or unreasonably disadvantage the ability of consumers to reach the Internet content, services, and applications of their choosing or of online content, applications and service providers to access consumers.[164] This standard also gives the Commission discretion to prohibit any Internet service provider practice that it believes violates any one of the non-exhaustive list of factors adopted in the *Title II Order*.[165]

73. We propose eliminating this Internet conduct standard and the non-exhaustive list of factors intended to guide application of the rule, and we seek comment on this proposal. What are the

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[161] *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, FCC 17-37 (rel. Apr. 21, 2017).

[162] *See* FCC, Broadband Deployment Advisory Committee, https://www.fcc.gov/broadband-deployment-advisory-committee.

[163] *Title II Order*, 30 FCC Rcd at 5659, para. 135.

[164] *Id.*

[165] *Title II Order*, 30 FCC Rcd at 5661–64, paras. 138–45 (listing seven "non-exhaustive" factors to guide the application of the Internet conduct standard, including end-user control; competitive effects; consumer protection; effect on innovation, investment, or broadband deployment; free expression, application/use-agnostic; and standard practices).

costs of the present Internet conduct standard and implementing factors? Do the standard and its implementing factors provide carriers with adequate notice of what they are and are not allowed to do?[166] Does the standard benefit consumers in any way and, if so, how? We believe that eliminating the Internet conduct standard will promote network investment and service-related innovation by eliminating the uncertainty caused by vague and undefined regulation. Do commenters agree?

74. Because the Internet conduct standard is premised on theoretical problems that will be adjudicated on an individual, case-by-case basis, Internet service providers must guess at what they are permitted and not permitted to do.[167] The now-retracted so-called Zero Rating Report issued by the Wireless Telecommunications Bureau illustrates the dilemma providers experience under a Title II regulatory regime.[168] After a thirteen-month investigation, the Report did not specifically call for an end to any provider's practices or identify any particular harm from offering consumers free data. Instead, it stated that the free-data plans "may raise" economic and public policy issues that "may harm consumers and competition."[169] It then reiterated that any determination about the harm from free data offerings would be made by the Commission on a "case-by-case" basis, using a "non-exhaustive list of factors."[170] Instead of giving providers clear rules of the road to govern future conduct, this report put a provider on notice that an enforcement action could be just around the corner. The report, and the investigation that preceded it, left Internet service providers with two options: either wait for a regulatory enforcement action that could arrive at some unspecified future point or stop providing consumers with innovative offerings. We seek comment on whether this roaming mandate has impacted innovation, and what impact that has had on consumers. We seek comment on whether eliminating this vague standard will spur innovation and benefit consumers.

75. We propose not to adopt any alternatives to the Internet conduct rule, and we seek comment on this proposal. Is there a need for any general non-discrimination standard in today's Internet marketplace? If so, what would that general non-discrimination standard be? The *2014 Notice* proposed prohibiting "commercially unreasonable practices."[171] Should we consider that alternative? Or should we consider another general rule and framework (such as Commission adjudication of non-discrimination complaints)? If we adopt our proposals to eliminate the Internet conduct standard and not to adopt any alternative general requirement, we seek comment on how we can encourage innovative business models that give consumers more choices and lower prices while also promoting consumer freedom on the Internet.

2. Determining the Need for the Bright Line Rules and the Transparency Rule

76. In the *Title II Order*, despite virtually no quantifiable evidence of consumer harm, the Commission nevertheless determined that it needed bright line rules banning three specific practices by providers of both fixed and mobile broadband Internet access service: blocking, throttling, and paid

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[166] *Id*. at 5659, para. 135 (stating that the Commission could investigate and prohibit "on a case-by-case basis, practices that unreasonably interfere with or unreasonably disadvantage the ability of consumers to reach the Internet content, services, and applications of their choosing or of edge providers to access consumers using the Internet"); *Zero Rating Report* at 3–5 (setting out 16 discrete criteria the Commission could use to evaluate offerings on a case-by-case basis).

[167] *See* Letter from 22 Small ISPs at 2 (asserting that the general conduct rules is "so vague and open-ended that we are concerned that the Commission would invoke it to sanction conduct for which we have no advance warning").

[168] Wireless Telecommunication Bureau, Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero Rated Content and Services (Jan. 11, 2017), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0111/DOC-342987A1.pdf (*Zero Rating Report*).

[169] *Id*. at 17.

[170] *Id*. at 10.

[171] *2014 Notice*, 29 FCC Rcd at 5602, para.116.

prioritization.[172] The Commission also "enhanced" the transparency rule by adopting additional disclosure requirements.[173] Today, we revisit these determinations and seek comment on whether we should keep, modify, or eliminate the bright line and transparency rules.

77. At the outset of our review of the Commission's existing rules, we seek comment on whether *ex ante* regulatory intervention in the market is necessary in the broadband context. Beyond the few, scattered anecdotes cited by the *Title II Order*, have there been additional, concrete incidents that threaten the four Internet Freedoms sufficient to warrant adopting across-the-board rules? Is there any evidence of market failure, or is there likely to be, sufficient to warrant pre-emptive, comprehensive regulation? How have marketplace developments impacted the incentive and ability, if any, of broadband Internet access service providers to engage in conduct that is contrary to the four Internet Freedoms? Must we find that market power exists to retain rules in this space, and if so must the rules only apply to providers that have market power? Further, should any approach we adopt—whether *ex ante* rules, expectations regarding industry self-governance, or *ex post* enforcement practices—vary based on the size, financial resources, customer base of the broadband Internet access service provider, and/or other factors? Specifically, we seek comment on whether rules are necessary for or burdensome on smaller providers.

78. The Commission partially justified the 2015 rules on the theory that the rules would prevent anti-competitive behavior by broadband Internet access providers' seeking to advantage affiliated content.[174] With the existence of antitrust regulations aimed at curbing various forms of anticompetitive conduct, such as collusion and vertical restraints under certain circumstances, we seek comment on whether these rules are unnecessary in light of these other regulatory regimes.[175] Could the continued existence of these rules negatively impact future innovative, pro-competitive business deals that would not by themselves run afoul of merger conditions or established antitrust law?

79. *Need for the No-Blocking Rule.* We emphasize that we oppose blocking lawful material. The Commission has repeatedly found the need for a no-blocking rule on principle, asserting that "the freedom to send and receive lawful content and to use and provide applications and services without fear of blocking is essential to the Internet's openness."[176] We merely seek comment on the appropriate means to achieve this outcome consistent with the goals of maintaining Internet freedom, maximizing investment, and respecting the rule of law. We seek comment on whether a codified no-blocking rule is needed to protect such freedoms. For example, prior to 2015, many large Internet service providers voluntarily abided by the 2010 no-blocking rule in the absence of a regulatory obligation to do so.[177] Do we have reason to think providers would behave differently today if the Commission were to eliminate

[172] *Title II Order*, 30 FCC Rcd at 5660, para. 137. *See* 47 U.S.C. §§ 201, 202, 208.

[173] *Title II Order*, 30 FCC Rcd at 5672, paras. 162–71.

[174] *Title II Order*, 30 FCC Rcd at 5652, para. 123 (stating that "if a broadband provider and an unaffiliated entity both offered over-the-top applications, the no-throttling rule would prohibit broadband providers from constraining bandwidth for the competing over-the-top offering to prevent it from reaching the broadband provider's end user in the same manner as the affiliated application.").

[175] *See generally* 47 U.S.C. § 152(b) ("[N]othing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws."). The *Title II Order* stated that it did not "preclude[] the Antitrust Division of the Department of Justice or the Commission itself from fulfilling their respective responsibilities under Section 7 of the Clayton Act (15 U.S.C. §18), or the Commission's public interest standard as it assesses prospective transactions."); Hazlett, Thomas W. and Wright, Joshua D., The Law and Economics of Network Neutrality (September 12, 2011). George Mason Law & Economics Research Paper No. 11-36, *available at* http://dx.doi.org/10.2139/ssrn.1917587.

[176] *Title II Order*, 30 FCC Rcd at 5647–48, para. 111; *2014 Notice*, 29 FCC Rcd at 5593, para. 89; *Open Internet Order*, 25 FCC Rcd at 17941–42, para. 62.

[177] *Title II Order*, 30 FCC Rcd at 5648, para. 112 & n.248.

the no-blocking rule? Is the no-blocking rule is necessary for or burdensome on smaller providers?

80. We seek comment on the continuing need for a no-blocking rule. The no-blocking rule, originally adopted in 2010, invalidated by the *Verizon* court, and re-adopted in the *Title II Order*, prohibits Internet service providers from blocking competitors' content by mandating that a customer has a right to access lawful content, applications, services, and to use non-harmful devices, subject to reasonable network management.[178]

81. If we determine that a no-blocking rule is indeed necessary to ensure a free, open, and dynamic Internet, what are the best means to achieve this outcome consistent with the goals of maintaining Internet freedom and maximizing investment? Should we consider modifying the existing no-blocking rule to better align with our proposed legal classification of broadband Internet access service as an information service? The *Verizon* court made clear that the Commission's 2010 no-blocking rule impermissibly subjected Internet service providers to common-carriage regulation.[179] We seek comment on whether there are other formulations of a no-blocking rule that are consistent with our proposed legal classification of broadband Internet access service as an information service and for which we would have legal authority.

82. *Need for the No-Throttling Rule.* In the *Title II Order*, the Commission concluded that throttling was a sufficiently severe and distinct threat that it required its own, separate, codified rule.[180] The no-throttling rule mirrors the no-blocking rule and bans the impairment or degradation of lawful Internet traffic or use of a non-harmful device, subject to reasonable network management practices.[181] We seek comment on whether this rule is still necessary, particularly for smaller providers. How does the rule benefit consumers, and what are its costs? When is "throttling" harmful to consumers? Does the no-throttling rule prevent providers from offering broadband Internet access service with differentiated prioritization that benefits consumers? Does the no-throttling rule harm latency-sensitive applications and content? Does it prevent product differentiation among broadband Internet access service providers? If we eliminate the no-blocking rule, should we also eliminate the no-throttling rule? If we determine that a no-throttling rule is indeed necessary to ensure a free, open, and dynamic Internet, are there ways in which we could modify the no-throttling rule so it aligns with our proposed legal classification of broadband Internet access service as an information service and for which we would have legal authority?

83. The Commission justified the separate, codified no-throttling rule on the theory of preventing anti-competitive behavior for broadband Internet access providers' affiliated content.[182] With the existence of antitrust and other regulations aimed at curbing collusion, we seek comment on whether a no-throttling rule is duplicative of these other regulatory regimes.[183] Could the continued existence of this

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[178] 47 CFR § 8.5; *Title II Order*, 30 FCC Rcd at 5648-49, paras. 112-13 ("A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.").

[179] *Verizon*, 740 F.3d at 658.

[180] 47 CFR § 8.7 ("A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management."); *Title II Order*, 30 FCC Rcd at 5652, para. 121.

[181] *Title II Order*, 30 FCC Rcd at 5651–52, para. 120.

[182] *Title II Order*, 30 FCC Rcd at 5652, para. 123.

[183] *See generally* 47 U.S.C. § 152(b) ("[N]othing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws."). The *Title II Order* stated that it did not "preclude[] the Antitrust Division of the Department of Justice or the Commission itself from fulfilling their respective responsibilities under Section 7 of the Clayton Act (15 U.S.C. §18), or the Commission's public interest standard as it assesses prospective transactions."); Hazlett, Thomas W. and Wright, Joshua D., The Law and Economics of Network Neutrality (Sept. 12, 2011), George Mason Law & Economics Research Paper No. 11-36, *available at*

rule negatively impact future innovative, pro-competitive business deals that would not by themselves run afoul of merger conditions or established antitrust law?

84. *Need for the No Paid Prioritization Rule.* The Commission concluded in the *Title II Order* that "fast lanes" or "paid prioritization" practices "harm consumers, competition, and innovation, as well as create disincentives to promote broadband deployment."[184] The Commission adopted this *ex ante* flat ban on individual negotiations to address an apparently nonexistent problem. The ban on paid prioritization did not exist prior to the *Title II Order* and even then the record evidence confirmed that no such rule was needed since several large Internet service providers made it clear that that they did not engage in paid prioritization[185] and had no plans to do so.[186] We seek comment on the continued need for such a rule and our authority to retain it.

85. What are the trade-offs in banning business models dependent on paid prioritization versus allowing them to occur when overseen by a regulator or industry actors? Is there a risk that banning paid prioritization suppresses pro-competitive activity? For example, could allowing paid prioritization give Internet service providers a supplemental revenue stream that would enable them to offer lower-priced broadband Internet access service to end-users? What would be the impacts on new startups and innovation? Does a no-paid-prioritization rule harm the development of real-time or interactive services?[187] Could allowing paid prioritization enable certain critical information, such as consumers' health care vital signs that are being monitored remotely, to be transmitted more efficiently or reliably? What other considerations mitigate any potential negative impacts from business models like paid prioritization? Should the Commission impose restrictions on these business models at all?

86. We seek comment on current traffic delivery arrangements online. How do content, application, and service providers host their data online? Do they rely on installing their own servers in data centers, content delivery networks, or cloud-based hosting? What are the varying service characteristics of these options and their varying costs? It appears that some larger online content providers like Netflix host their own data centers and interconnect directly with Internet service providers.[188] Is that still true? What are the service characteristics and costs of this option? How should the existence of these arrangement impact our evaluation of whether Internet service providers should be able to offer an alternative delivery option such paid prioritization?

87. For those parties that believe an *ex ante* flat ban on paid prioritization is necessary, are there other formulations of a no-paid-prioritization rule that are consistent with our proposed legal classification of broadband Internet access service as an information service and for which we would have legal authority? Are there any other formulations that are consistent with allowing pro-competitive or pro-consumer paid prioritization arrangements? Would we need to modify the rule and, if so, how?

88. *Need for the Transparency Rule.* We seek comment on whether to keep, modify, or eliminate the transparency rule.[189] When the Commission adopted the transparency rule in 2010 and enhanced it in 2015, it found that "effective disclosure of Internet service providers' network management practices, performance, and commercial terms of service promotes competition, innovation, investment,

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http://dx.doi.org/10.2139/ssrn.1917587.

[184] 47 CFR § 8.9; *Title II Order*, 30 FCC Rcd at 5653, para. 125.

[185] *See Title II Order*, 30 FCC Rcd at 5656, para 127 & n. 301 (listing commenters that do not engage in paid prioritization).

[186] *See id.* at 5656, para. 127 & n. 302 (listing commenters that did not plan to engage in paid prioritization).

[187] Brent Skorup, The FCC's Misguided Paid Priority Ban, The Technology Liberation Front (Apr. 13, 2017), https://techliberation.com/2017/04/13/the-fccs-misguided-paid-priority-ban/.

[188] *See, e.g.*, *Title II Order*, 30 FCC Rcd at 200 n.504.

[189] 47 CFR § 8.8.

end-user choice, and broadband adoption."[190] We continue to support these objectives and seek comment on whether the existing transparency rule is the best way to accomplish them, or if there are other methods we can employ to achieve the goals of competition, innovation, investment, end-user choice, and broadband adoption.

89. Although we agree that the disclosure requirements were among some of the least intrusive regulatory measures imposed by the *Title II Order*,[191] we seek comment on whether the additional reporting obligations from that rule remains necessary in today's competitive broadband marketplace. What are the benefits and drawbacks of those additional reporting obligations? Is the length of time necessary to obtain approval of these rules, first adopted in February 2015 and yet not going into effect until nearly two years later, illustrative of just how burdensome the new enhancements are in comparison to the 2010 rule?[192] Would the original transparency rule, which has been continuously operational since it came into effect following adoption of the *Open Internet Order*, be sufficient to protect consumers? Although the *Verizon* court upheld the 2010 transparency rule, we seek comment on our authority to retain the 2015 "enhancements" or to modify the transparency rule in a manner distinct from the *Open Internet Order* or *Title II Order*. For example, does the full and accurate disclosure of service plan information to consumers carry with it most of the benefits of the rule? How often do non-consumers rely on the additional disclosures required by the transparency rule? Are those additional benefits worth the additional cost of compliance, especially for small businesses?

90. Assuming we find a transparency rule necessary, how should we treat the additional guidance related to the transparency rule? For example, should we continue to enforce guidance from the Commission's Chief Technology Officer regarding acceptable methodologies for disclosure of network performance to satisfy the enhanced transparency rule?[193] Is there merit in continuing to promote the broadband consumer labels that provided ISPs with a safe harbor—or do those standardized notices harm consumers by preventing them from obtaining additional information?[194] Does the repeated need for advisory guidance following the original 2010 transparency rule indicate that the rule itself is too open-ended?[195]

3. Additional Considerations Applicable to Existing Rules

91. Should we decide to keep or modify any of our existing open Internet rules, we propose and seek comment on several issues related to their continued operation.

92. *Scope.* Should we keep any of the existing bright-line rules or the transparency rule, we propose maintaining the definitions of the services applicable to the rules and the exception for reasonable

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[190] *Title II Order*, 30 FCC Rcd at 5670, para. 157; *Open Internet Order*, 25 FCC Rcd at 17938–39, para. 56.

[191] *See Title II Order*, 30 FCC Rcd at 5669, para. 154; *2014 Notice*, 29 FCC Rcd at 5585, para.66.

[192] *See Notice of OMB Approval of the 2015 Enhancements to the Open Internet Transparency Requirements*, 31 FCC Rcd 13218, Public Notice (CGB 2016).

[193] *See Guidance on Open Internet Transparency Rule Requirements*, Public Notice, 31 FCC Rcd 5330 (2016) (*2016 Advisory Guidance*).

[194] *See Consumer & Governmental Affairs, Wireline Competition, & Wireless Telecommunications Bureaus Approve Open Internet Broadband Consumer Labels*, Public Notice, 31 FCC Rcd 3358 (CGB 2016). Our seeking comment on the policy implications of the continued use of the broadband labels is not a reflection on the significant resource commitments from industry and consumer group representatives through the Commission's Consumer Advisory Committee, whose dedication and work on a variety of issues we value and appreciate.

[195] *FCC Enforcement Bureau and Office of General Counsel Issue Advisory Guidance for Compliance with Open Internet Transparency Rule*, GN Docket No. 09-191, WC Docket No. 07-52, Public Notice, 26 FCC Rcd 9411 (2011) (*2011 Advisory Guidance*); *FCC Enforcement Advisory, Open Internet Transparency Rule: Broadband Providers Must Disclose Accurate Information to Protect Consumers*, Public Notice, 29 FCC Rcd 8606, 8607 (2014) (*2014 Advisory Guidance*).

network management adopted in the *Title II Order*.[196] Reasonable network management "allow[s] service providers the freedom to address legitimate needs such as avoiding network congestion and combating harmful or illegal content" without running afoul of the rules.[197] With respect to the definition of "reasonable network management," we seek comment on whether we should eliminate the restriction imposed by the *Title II Order* that the exception will only be considered if used for a "technical management justification rather than other business justifications,"[198] or if we should return to the 2010 definition of "reasonable network management" that did not contain that qualifier.[199]

93. For the reasonable network management exception and definition of non-broadband Internet access service data services that fall outside the scope of the rules, we seek comment on how we should view any additional guidance explaining those terms as set forth in the *Title II Order*, but not codified as part of the rules.[200] Should we follow the case-by-case approach taken for evaluating reasonable network management?[201] For non-broadband Internet access service data services, should we adhere to the characteristics of non-broadband Internet access service data services described in the *Title II Order*?[202] Or, should we revert to the general concept of non-broadband Internet access service data services discussed in the *Open Internet Order* (and then known as "specialized services")? Further, for non-broadband Internet access service data services, should we eliminate the guidance that if non-broadband Internet access service data services "are undermining investment, innovation, competition, and end-user benefits," then the Commission will take enforcement action—including the particularized focus on ensuring that "over-the-top services offered over the Internet are not impeded in their ability to compete with other data services?"[203]

94. *Application to Mobile.* To the extent we keep or modify any of the existing rules, we seek comment on whether mobile broadband should be treated differently from fixed broadband. The *Title II Order* applied the Internet openness rules equally to both fixed and mobile broadband Internet access services.[204] This approach departed from the *Open Internet Order's* framework, which adopted a different no-blocking standard for mobile broadband Internet access service and excluded mobile from

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[196] 47 CFR § 8.2; *Title II Order*, 30 FCC Rcd at 5696–99, paras. 207–13.

[197] *Title II Order*, 30 FCC Rcd at 5622, para. 69.

[198] *Id.* at 5670, para. 216 (describing a non-technical management justification to be "a practice that permits different levels of network access for similarly situated users based solely on the particular plan to which the user has subscribed").

[199] *Compare* 47 CFR § 8.2 (defining a reasonable network management practice as, "a practice that has a primarily technical network management justification, but does not include other business practices," which is "reasonable if it is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service"), *with* 47 CFR § 8.11 (2012) (defining a reasonable network management practice as a practice that, "is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service").

[200] *Title II Order*, 30 FCC Rcd at 5701–04, paras. 218–24.

[201] *Open Internet Order*, 25 FCC Rcd at 17952, para. 83.

[202] *Title II Order*, 30 FCC Rcd at 5696–97, para. 208; *see also* Open Internet Advisory Committee, 2013 Annual Report (Aug. 20, 2013), at 69, http://transition.fcc.gov/cgb/oiac/oiac-2013-annual-report.pdf (2013 OIAC Annual Report) (these characteristics include that non-BIAS data services are not used to reach large parts of the Internet, not a generic platform—but rather a specific "application level" service, and use some form of network management to isolate the capacity used by these services from that used by broadband Internet access services).

[203] *Title II Order*, 30 FCC Rcd at 5697, para. 210.

[204] *Title II Order*, 30 FCC Rcd at 5635–43, 5650, paras. 88–101, 117.

the no unreasonable discrimination rule.[205] Are there legal, technical, economic, and/or policy reasons to distinguish mobile and fixed broadband with respect to rules in this context, and if so how should we differentiate the two in any rules that we keep or modify? For instance, several mobile providers who opposed application of the broader rules in 2015 argued that additional rules were unnecessary because competition for mobile broadband service adequately restrained the behavior of mobile Internet service providers.[206] We seek comment on whether this contention is correct in today's marketplace.

4. Enforcement Regime

95. Should we keep or modify any of the Commission's existing rules discussed above, we seek comment on how we should enforce them. In the *Open Internet Order* the Commission set forth procedures for filing both informal[207] and formal[208] complaints. Commission rules currently provide for filing fees in the case of complaints to enforce Part 8 rules governing broadband Internet access service and in the case of data roaming complaints.[209] Would those rules need to be modified in the event that we reclassify broadband Internet access service? Could some rules subject to those complaint procedures remain? Are there other similar issues the Commission would need to address? The *Title II Order* also allowed the Enforcement Bureau to issue advisory opinions[210] and enforcement advisories,[211] and it created an ombudsperson position to provide effective access to dispute resolution.[212] We seek comment on whether advisory opinions or enforcement advisories have benefitted consumers or broadband Internet access service providers. If we restore the broadband Internet access service classification to an information service, should that alter our complaint and enforcement process in this context?

96. Additionally, we seek comment on streamlining future enforcement processes. For instance, we propose eliminating the ombudsperson role. Is the role of an ombudsperson necessary to protect consumer, business, and other organizations' interests when the Commission has a Bureau—the Consumer and Governmental Affairs Bureau (CGB)—dedicated to protecting consumer interests?[213] Our experience suggests that consumers are comfortable working with CGB, and typically did not call on the ombudsperson specifically. Has the ombudsperson been called to action to assist in circumstances that otherwise could not have been handled by CGB?

97. What have been the benefits and drawbacks of the complaint procedures instituted in 2010 and 2015? Since these rules were formally codified in 2010, no formal complaints have been filed under them. Can we infer that parties heeded the Commission's encouragement to "resolve disputes through informal discussions and private negotiations" without Commission involvement, except through the informal complaint process?[214] Does the lack of formal complaints indicate that dedicated, formal enforcement procedures are unwarranted? If we restore broadband Internet access service's classification as an information service, should that alter our complaint and enforcement process in this context? If so, in what way should the processes be altered? Are there methods other than formal complaints we can

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[205] *Open Internet Order*, 25 FCC Rcd at 17956–57, 17959–60, paras. 94–95, 99.

[206] *Title II Order*, 30 FCC Rcd at 5638, para. 93.

[207] *Open Internet Order*, 25 FCC Rcd at 17986–87, para. 153.

[208] *Id*. at 17987–89, paras. 154–59.

[209] 47 CFR §§ 8.13(b), 20.12(e)(2).

[210] *Title II Order*, 30 FCC Rcd at 5706, para. 229.

[211] *Id*. at 5709–10, para. 240.

[212] *Id*. at 5714, para. 254.

[213] *See Title II Order*, 30 FCC Rcd at 5714–15, paras. 254–56.

[214] *Title II Order*, 30 FCC Rcd at 5704, para. 224 (citing *2014 Notice*, 29 FCC Rcd at 5618, para. 161; *Open Internet Order*, 25 FCC Rcd at 17986, para. 15).

employ to ensure a free and open Internet?

98. In addition to the enforcement regime, the *Title II Order* delegated authority to several Bureaus and Offices to make further decisions involving the rules following their adoption. For example, the *Title II Order* delegated authority to the Chief Technologist to provide guidance under the transparency rule and further delegated authority to several Bureaus to determine whether the safe harbor disclosures under the transparency rule aligned with the Commission's expectations.[215] If we determine there is no need for the existing transparency rule or enforcement regime, then we believe that the technological and safe harbor guidance would become irrelevant. We also believe that the safe harbor disclosure guidance would be rendered moot. We seek comment on this analysis and on whether there nonetheless are any affirmative steps the Commission should take with respect either to those delegations of authority or to actions already taken in reliance on that delegated authority.

B. Legal Authority to Adopt Rules

99. We seek comment on the legal authority that the Commission would have in this area if we adopted our lead proposal to classify broadband Internet access service as an information service.

100. *Section 706.* We seek comment on whether section 706(a) and (b) of the 1996 Act are best interpreted as hortatory rather than as delegations of regulatory authority. Such an interpretation generally is reflected in the Commission's approach to section 706 prior to 2010.[216] The text of these provisions also appears more naturally read as hortatory, particularly given the lack of any express grant of rulemaking authority, authority to prescribe or proscribe the conduct of any party, or to enforce compliance. Although some courts have held that the Commission's post-2010 interpretation of section 706(a) and/or (b) as a grant of regulatory authority was not unreasonable, we seek comment on whether interpreting those provisions as hortatory nonetheless is the better reading.[217] Or should we maintain our post-2010 interpretation of these provisions? Alternatively, we seek comment whether section 706 reflects a "deregulatory bent,"[218] and, if so, how we should interpret that with respect to obligations for regulated entities. If section 706 reflects a deregulatory emphasis, what authority does it give the Commission, particularly in situations in which capital expenditures by Internet service providers have slowed, as they have in the past year under Title II regulation? If we interpret section 706(a) as a grant of authority, does that mean state commission would have coequal authority? If we interpret section 706(b) as a grant of authority, what would happen to any rules adopted using that authority if the Commission later found that advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion? Are there other interpretations of section 706 of the 1996 Act that we should consider?

101. *Section 230.* We also seek comment on whether section 230 gives us the authority to retain any rules that were adopted in the *Title II Order*. In *Comcast*, the D.C. Circuit observed that the

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[215] *Title II Order*, 30 FCC Rcd at 5673–75, 80–81, paras. 166, 180.

[216] *See, e.g.*, *Comcast Corp. v. FCC*, 600 F.3d 642, 658-59 (D.C. Cir. 2010) (*Comcast*) (discussing *Deployment of Wireline Servs. Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24012, 24048, para. 77 (1998)).

[217] *See, e.g.*, *Verizon*, 740 F.3d at 636–42 (rejecting arguments that it was unreasonable for the Commission to interpret Sections 706(a) and (b) as granting regulatory authority); *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014) (rejecting arguments that it was unreasonable for the Commission to interpret Section 706(b) as granting regulatory authority); *USTelecom*, 825 F.3d at 733–34 (reaffirming the holding in *Verizon* regarding Section 706).

[218] *See, e.g.*, Dissenting Statement of Commissioner Robert McDowell, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability To All Americans In A Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant To Section 706 of the Telecommunications Act of 1996, As Amended By the Broadband Data Improvement Act*, GN Docket Nos. 09-137, 09-51, Sixth Broadband Deployment Report, 25 FCC Rcd 9556, 9693 ("The plain language of Section 706 was written with a deregulatory bent, but I am concerned that regulating with a light touch is not what this current Report will be used for in the future.").

Commission there "acknowledge[d] that section 230(b)" is a "statement [] of policy that [itself] delegate[s] no regulatory authority."[219] Are there grounds for the Commission to revisit that interpretation or otherwise invoke section 230 here? For example, the D.C. Circuit in *Comcast* speculated that "[p]erhaps the Commission could use section 230(b) . . . to demonstrate . . . a connection" to an "express statutory delegation of authority," although it had not done so there.[220] If the Commission were to demonstrate a connection to an express statutory delegation of authority, what would such a demonstration look like? What, if any, express statutory delegations of authority over broadband Internet access service exist?

102. *Other Sources of Legal Authority*. Should we determine rules are indeed necessary in this space, we seek comment on any other sources of independent legal authority we might use to support such rules. For example, we seek comment on the Communications Act authority cited by the Commission in its *Open Internet Order*.[221] If any other sources of legal authority exist, to what extent could they be used? And, what are the trade-offs, including the advantages and disadvantages, of using any of these other sources of legal authority in lieu of Title II provisions that depend on the classification of BIAS as a telecommunications service and/or section 706 of the 1996 Act?

103. *Constraints on our Legal Authority*. The Commission has repeatedly recognized that adopting rules like these raises constitutional concerns.[222] For example, some petitioners in the *USTelecom v. FCC* case argued that compelling an Internet service provider to carry all speech violates the First Amendment.[223] Others have argued that "[t]here is no principled basis for distinguishing the speech of broadband providers from other speakers using older technologies."[224] The D.C. Circuit Court of Appeals disagreed, finding that "the First Amendment poses no bar to the rules."[225] We seek comment on whether the First Amendment or any other constitutional provision, or any other federal law, would constrain the Commission from adopting rules here. If a rule proposes serious constitutional concerns, how should we modify it? Does the continued classification of broadband Internet access service as a common-carriage service itself raise any constitutional concerns?

C. Cost Benefit Analysis

104. We propose as part of this proceeding to conduct a cost-benefit analysis (CBA). We propose to compare the costs and the benefits of maintaining the classification of broadband Internet access service as a telecommunications service (i.e. Title II regulation);[226] maintaining the Internet conduct rule; maintaining the no blocking rule; maintaining the no throttling rule; maintaining the ban on paid prioritization; maintaining the transparency rules; and acting on the other interpretive and policy changes for which we seek comment above. We seek comment on how the CBA should be conducted to appropriately separate or combine the analyses of each piece discussed above. We also seek comment

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[219] *Comcast*, 600 F.3d at 652.

[220] *See, e.g.*, *id*. at 654–55.

[221] *See Open Internet Order*, 25 FCC Rcd at 17972–80, 17981, paras. 124–35, 137.

[222] *See, e.g.*, *2014 Notice*, 29 FCC Rcd at 5617, para. 159.

[223] *See* Joint Brief for Petitioners Alamo Broadband Inc. and Daniel Berninger, *USTelecom v. FCC*, Case No. 15-1063, at 4–9 (July 30, 2015) (citing *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 9 (1986); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257 (1974), among other cases).

[224] Harold Furchtgott-Roth, Net Neutrality Violates First Amendment, Hudson Institute (Nov. 23, 2015), https://hudson.org/research/11977-net-neutrality-violates-first-amendment.

[225] *USTelecom*, 825 F.3d at 739.

[226] Throughout this section, when discussing maintaining broadband Internet access service as a telecommunication service, we mean as actually implemented by the *Title II Order*, where the Commission forbore from applying some sections of the Act.

generally on the importance of conducting a CBA as well as the interaction between the Commission's public interest standard and a weighing of the costs and benefits.

105. Given the size of the economic impacts due to our decisions in this proceeding, it is especially important to evaluate whether the decision will have net positive benefits. Our presumption is that the effects of the decision would have an annual effect on the economy of *at least* $100 million which is the Federal government's standard threshold for requiring agencies covered by Executive Order 12866 to conduct a regulatory analysis.[227] Executive Order 12866 indicates regulatory actions are economically significant if they "[h]ave an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities."[228] While the Commission is not required by law to comply with this Executive Order, we believe the $100 million threshold provides a helpful guideline for when a CBA is clearly appropriate.[229] We seek comment on our assertion that conducting a CBA is appropriate and that the decision is likely to be economically significant.

106. In conducting the CBA, we propose to follow standard practices employed by the federal government. Specifically we propose to follow the guidelines in Section E ("Identifying and Measuring Benefits and Costs") of the Office of Management and Budget's Circular A-4.[230] This publication provides guidelines which an agency can follow for identifying and quantifying costs and benefits associated with regulatory decisions while allowing for appropriate latitude in how the analysis is conducted for a particular regulatory situation. We seek comment on following Circular A-A generally. We also seek comment on any specific portions of Circular A-4 where the Commission should diverge from the guidance provided. Commenters should explain why particular guidance in Circular A-4 should not be followed in this circumstance and should propose alternatives.

107. Any CBA should be conducted by comparing the costs and benefits relative to the "baseline" scenario. As OMB Circular A-4 explains, "[t]his baseline should be the best assessment of the way the world would look absent the proposed action." Care should be taken to recognize that in certain cases repealing or eliminating a rule does not result in a total lack of regulation but instead means that other regulations continue to operate or other regulatory bodies will have authority. For example, as we evaluate the costs and benefits of maintaining the current classification of broadband Internet access service as a telecommunications service, the CBA should recognize that changing the classification of broadband Internet access service to an information service would result in the FTC having jurisdiction over certain aspects of such services. Therefore, the benefits and costs of the FCC maintaining Title II jurisdiction over broadband Internet access service should be calculated with FTC enforcement as the appropriate baseline. In this example, the benefits of maintaining the Commission's Title II classification are those benefits that exist over and above the "baseline" scenario of FTC jurisdiction (and FCC Title I protections). Likewise, the costs of maintaining Title II should be estimated as those costs of *ex ante* FCC regulation relative to FTC *ex post* regulation. We seek comment on the appropriate baseline scenarios that should be used and on our proposed course of action above.

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[227] A "regulatory analysis" has three key components: (1) a statement of the need for a proposed action, (2) an examinations of alternative approaches, and (3) an evaluation of the benefits and the costs. *See* Office of Management and Budget, Circular A-4, https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/#a. The other parts of the *Order* effectively seek comment on the first and second pieces of the regulatory analysis.

[228] For entities covered by Executive Order 12866, Regulatory actions deemed economically significant must undergo review by the Office of Information and Regulatory Affairs (OIRA) and this review will typically require an accounting of the costs and benefits. *See* https://www.reginfo.gov/public/jsp/Utilities/faq.jsp.

[229] While we believe it is clearly appropriate for actions in excess of $100 million, we make no suggestion here about whether the Commission should conduct CBAs below that threshold.

[230] Office of Management and Budget, Circular A-4, https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/#a.

108. In weighing the costs and benefits of any policy, there always exists an element of uncertainty. As commenters suggest costs and benefits the Commission should consider, we ask that to the extent possible information could also be provided about the level of certainty surrounding a scenario or particular value. Also, various costs and benefits are likely to occur at different points in time. When suggesting costs and benefits, we seek comment on the timing of those costs and benefits.[231] We also seek comment on how uncertainty around and timing of costs and benefits should interact in the analysis.

109. *Costs*. There is evidence that the actions taken by the Commission in the *Title II Order* have reduced investments by ISPs.[232] We presume that maintaining those actions would depress investment relative to the baseline. Many of the costs of lower or misallocated investment in networks and in other sectors of the digital economy will be due to consumers and businesses having less broadband Internet access service coverage and lower quality of service. Since the networks built with capital investments are only a means to an end, we believe that the private costs borne by consumers and businesses of maintaining the *status quo* result from decreased value derived from using the networks. We seek comment on this analysis. What approaches should we use to capture these costs? We seek comments on particular methods and data sources we might use to estimate the private costs of forgoing the building, maintaining, or upgrading of these networks.

110. In addition to the private costs discussed above, foregone networks may also impose additional societal costs. In particular, fewer network effects created by increased connectivity will occur. As another example, society will not realize some efficiencies and savings from governments delivering services over the networks. Additionally, there are likely long run costs due to forgoing better connectivity that would allow new products and services to be created. We seek comment on this analysis. How should our CBA incorporate these types of cost into the analysis? What other ancillary costs might exist? What data is appropriate to use?

111. It is also likely that the foregone investment *per se* results in economic costs (e.g. fewer network construction jobs), and we seek comment on how the Commission should incorporate any such these costs into the analysis. For example, should the Commission use a multiplier to account for economic activity missed due to tempered investment? If so, what are the appropriate multipliers to use? Commenters should provide sources to justify recommendations for multiplier values.

112. Lastly, there may be other costs that are not directly the result of decreased investment in networks. Maintaining current policies may prevent new business models or new product and services from being viable and ultimately delivering value to society. We seek comment on such costs and how we may incorporate them into our analysis.

113. *Benefits*. There are various theoretical possibilities for economic benefits created by the current policies. We therefore seek comment on these benefits. Commenters should identify these benefits relative to an appropriate baseline, not relative to a situation where there is no regulation or statute to govern behavior. For example, if the ban on paid prioritization is maintained but broadband Internet access service is classified as an information service, then commenters should identify the benefits a blanket ban on paid prioritization carries over the FTC's authority to police anticompetitive conduct.

114. We particularly seek comments that attempt to quantify the benefits rather than merely suggest the existence of benefits without any indication of its magnitude. We also ask commenters to particularly highlight benefits where *actual* misconduct has been observed. To the extent the baseline scenario allows any market failures to go unregulated, commenters should clearly identify the market

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[231] As explained in OMB Circular A-4, the timing of costs and benefits is important because ultimately the CBA will need to discount future costs and benefits for the purpose of calculating net present benefits.

[232] *See, e.g.*, Hal Singer, *2016 Broadband Capex Survey: Tracking Investment in the Title II Era* (Mar. 1, 2016), https://haljsinger.wordpress.com/2017/03/01/2016-broadband-capex-survey-tracking-investment-in-the-title-ii-era.

failure and the estimated economic benefit associated with addressing through maintenance of current policies.

V. PROCEDURAL MATTERS

A. Initial Regulatory Flexibility Analysis

115. As required by the Regulatory Flexibility Act of 1980 (RFA),[233] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) for this *Notice of Proposed Rulemaking*, of the possible significant economic impact on small entities of the policies and rules addressed in this document. The IRFA is set forth in Appendix B. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed on or before the dates on the first page of this *Notice of Proposed Rulemaking*. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this *Notice of Proposed Rulemaking*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[234]

B. Initial Paperwork Reduction Act Analysis

116. This document contains proposed modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget ("OMB") to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. § 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

117. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

C. Other Procedural Matters

1. Ex Parte Rules – Permit-But-Disclose

118. The proceeding this NPRM initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[235] Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment

[233] *See* 5 U.S.C. § 603.

[234] *See* 5 U.S.C. § 603(a).

[235] 47 CFR §§ 1.1200 *et seq.*

filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

2. Comment Filing Procedures

119. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System ("ECFS"). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

120. Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://fjallfoss.fcc.gov/ecfs2/.

121. Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

122. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

123. All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

124. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

125. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

126. *Availability of Documents*. Comments, reply comments, and ex parte submissions will be publically available online via ECFS.[236] These documents will also be available for public inspection during regular business hours in the FCC Reference Information Center, which is located in Room CY-A257 at FCC Headquarters, 445 12th Street, SW, Washington, DC 20554. The Reference Information Center is open to the public Monday through Thursday from 8:00 a.m. to 4:30 p.m. and Friday from 8:00 a.m. to 11:30 a.m.

127. *People with Disabilities*. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

VI. ORDERING CLAUSES

128. Accordingly, IT IS ORDERED that, pursuant to sections 3, 10, 201(b), 230, 254(e), 303(r), and 332 of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. §§ 153, 160, 201(b), 254(e), 303(r), 332, 1302, this Notice of Proposed Rulemaking IS ADOPTED.

129. IT IS FURTHER ORDERED that pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments on this Notice of Proposed Rulemaking on or before July 17, 2017 and reply comments on or before August 16, 2017.

130. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs

[236] Documents will generally be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

APPENDIX A

Proposed Rules

Part 20 of the Commission's rules is amended as follows:

PART 20: COMMERCIAL MOBILE SERVICES

1. Section 20.3 is amended to read as follows:

§ 20.3 Definitions.

* * * * *

Commercial mobile radio service. * * *

* * * * *

(b) The functional equivalent of such a mobile service described in paragraph (a) of this section.

* * * * *

Interconnected Service. A service:

(a) That is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network; or

(b) * * *

* * * * *

Public Switched Network. Any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use the North American Numbering Plan in connection with the provision of switched services.

* * * *

2. Section 8.11 is repealed and reserved.

APPENDIX B

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities from the policies and rules proposed in this Notice of Proposed Rulemaking (Notice). The Commission requests written public comment on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice provided on the first page of the Notice. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[2] In addition, the Notice and IRFA (or summaries thereof) will be published in the Federal Register.[3]

A. Need for, and Objectives of, the Proposed Rules

2. With this Notice, the Commission initiates a new rulemaking that proposes to restore the market-based policies necessary to preserve the future of Internet Freedom, and to reverse the decline in infrastructure investment, innovation, and options for American consumers put into motion by the Commission in 2015. The Commission's *Title II Order* has put at risk online investment and innovation, threatening the very open Internet it purported to preserve. Investment in broadband networks declined. Internet service providers (ISPs) have pulled back on plans to deploy new and upgraded infrastructure and services to consumers. This is particularly true of the smallest Internet service providers that serve consumers in rural, low-income, and other underserved communities. This rulemaking continues the critical work to promote broadband deployment to rural consumers and infrastructure investment throughout our nation, to brighten the future of innovation both within networks and at their edge, and to close the digital divide.

3. The Notice sets forth the following three main proposals: returning broadband Internet access service to its previously-settled classification as an information service, restoring the definition of "public switched telephone network" to its original meaning, and eliminating the Internet conduct standard. The Notice also seeks comment on a variety of issues relating to the effects of the Commission's *Title II Order*, including the burdens imposed by the *Title II Order* that have led to decreased investment and reduced innovation and have been felt by Internet service providers (ISPs) and consumers. Additionally, the Notice seeks comment on the effects of reclassifying broadband Internet access service as an information service on the existing enforcement regime and the necessity of the other rules adopted in the *Title II Order*.

4. First, the Notice proposes to return broadband Internet access service to its classification as an information service. The Notice seeks comment on the text of the 1996 Act and whether the language of the Act indicates that broadband Internet access is service is properly classified as an information service. Addition, the Notice seeks comment on whether, and to what extent, Commission precedent classifying broadband Internet access service as an information service should continue to govern broadband Internet access service in the future. Second, the Notice proposes returning the definition of "public switched telephone network" to its classification as it existed before the *Title II Order* as an information service. Third, the Notice seeks comments on what effects, if any, returning broadband Internet access service to its original classification as an information service would have on the

[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. § 603(a).

[3] *Id.*

regulatory structures created by the *Title II Order*.

5. Next, the Notice proposes re-evaluating the existing rules and regulations imposed on ISPs. The Notice proposes eliminating the Internet conduct standard, and it seeks comment on the usefulness and necessity of the no-blocking rule, the no-throttling rule, the no paid prioritization rule, and the transparency rule. The Notice also seeks comment on what an effective enforcement regime would look like if broadband Internet access service is classified as an information service.

B. Legal Basis

6. The legal basis for any action that may be taken pursuant to the Notice is contained in sections 3, 10, 201(b), 230, 254(e), 303(r), 332, of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. §§ 153, 160, 201(b), 254(e), 303(r), 332, 1302.

C. Description and Estimate of the Number of Small Entities to Which the Rules Would Apply

7. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[4] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[5] In addition, the term "small business" has the same meaning as the term "small-business concern" under the Small Business Act.[6] A small-business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[7]

1. Total Small Entities

8. Our proposed action, if implemented, may, over time, affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive, statutory small entity size standards.[8] First, nationwide, there are a total of approximately 28.2 million small businesses, according to the SBA.[9] In addition, a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[10] Nationwide, as of 2007, there were approximately 1,621,315 small organizations.[11] Finally, the term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[12] Census Bureau data

[4] *See* 5 U.S.C. § 603(b)(3).

[5] *See* 5 U.S.C. § 601(6).

[6] *See* 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[7] *See* 15 U.S.C. § 632.

[8] *See* 5 U.S.C. §§ 601(3)-(6).

[9] *See* SBA, Office of Advocacy, "Frequently Asked Questions," http://www.sba.gov/sites/default/files/FAQ_March_2014_0.pdf (last accessed Apr. 28, 2014).

[10] 5 U.S.C. § 601(4).

[11] Indep. Sector, The New Nonprofit Almanac and Desk Reference (2010).

[12] 5 U.S.C. § 601(5).

for 2007 indicate that there were 89,476 local governmental jurisdictions in the United States.[13] We estimate that, of this total, as many as 88,761 entities may qualify as "small governmental jurisdictions."[14] Thus, we estimate that most governmental jurisdictions are small.

2. Broadband Internet Access Service Providers

9. The proposed rules would apply to broadband Internet access service providers (BIAS providers). The Economic Census places these firms, whose services might include Voice over Internet Protocol (VoIP), in either of two categories, depending on whether the service is provided over the provider's own telecommunications facilities (e.g., cable and DSL ISPs), or over client-supplied telecommunications connections (e.g., dial-up ISPs). The former are within the category of Wired Telecommunications Carriers,[15] which has an SBA small business size standard of 1,500 or fewer employees.[16] These are also labeled "broadband." The latter are within the category of All Other Telecommunications,[17] which has a size standard of annual receipts of $25 million or less.[18] These are labeled non-broadband. According to Census Bureau data for 2007, there were 3,188 firms in the first category, total, that operated for the entire year.[19] Of this total, 3144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1000 employees or more.[20] For the second category, the data show that 1,274 firms operated for the entire year.[21] Of those, 1,252 had annual receipts below $25 million per year. Consequently, we estimate that the majority of broadband Internet access service provider firms are small entities.

10. The broadband Internet access service provider industry has changed since this definition was introduced in 2007. The data cited above may therefore include entities that no longer provide broadband Internet access service, and may exclude entities that now provide such service. To ensure that this IRFA describes the universe of small entities that our action might affect, we discuss in turn several

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[13] U.S. Census Bureau, Statistical Abstract of the United States: 2012, Section 8, page 267, tbl. 429, https://www.census.gov/compendia/statab/2012/tables/12s0429.pdf/ (data cited therein are from 2007).

[14] The 2007 U.S. Census data for small governmental organizations are not presented based on the size of the population in each such organization. There were 89,476 local governmental organizations in 2007. If we assume that county, municipal, township, and school district organizations are more likely than larger governmental organizations to have populations of 50,000 or less, the total of these organizations is 52,095. As a basis of estimating how many of these 89,476 local government organizations were small, in 2011, we note that there were a total of 715 cities and towns (incorporated places and minor civil divisions) with populations over 50,000. City and Town Totals Vintage: 2011 – U.S. Census Bureau, http://www.census.gov/popest/data/cities/totals/2011/index.html. If we subtract the 715 cities and towns that meet or exceed the 50,000 population threshold, we conclude that approximately 88,761 are small. U.S. Census Bureau, Statistical Abstract of the United States: 2012, Section 8, page 267, tbl. 429, https://www.census.gov/compendia/statab/2012/tables/12s0429.pdf/ (data cited therein are from 2007).

[15] U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers," http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517110&search=2012%20NAICS%20Search.

[16] 13 CFR § 121.201, NAICS code 517110.

[17] U.S. Census Bureau, 2012 NAICS Definitions, "517919 All Other Telecommunications," http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517919&search=2012%20NAICS%20Search .

.[18] 13 CFR § 121.201, NAICS code 517919.

[19] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517110" (2010).

[20] *See id.*

[21] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, "Establishment and Firm Size," NAICS code 5179191 (2010) (receipts size).

different types of entities that might be providing broadband Internet access service. We note that, although we have no specific information on the number of small entities that provide broadband Internet access service over unlicensed spectrum, we include these entities in our Initial Regulatory Flexibility Analysis.

3. Wireline Providers

11. *Wired Telecommunications Carriers*. The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.[22] According to Census Bureau data for 2007, there were 3,188 firms in this category, total, that operated for the entire year.[23] Of this total, 3,144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1000 employees or more.[24] Thus, under this size standard, the majority of firms can be considered small.

12. *Local Exchange Carriers (LECs)*. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[25] According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.[26] Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.[27] Consequently, the Commission estimates that most providers of local exchange service are small entities that may be affected by rules adopted pursuant to the Notice.

13. *Incumbent Local Exchange Carriers* (*Incumbent LECs*). Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The closest applicable size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[28] According to Commission data,[29] 1,307 carriers reported that they were incumbent local exchange service providers.[30] Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.[31] Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our proposed rules.

14. *Competitive Local Exchange Carriers (Competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers*. Neither the Commission

[22] 13 CFR § 121.201, NAICS code 517110.

[23] U.S. Census Bureau, 2007 Economic Census, Information: Subject Series – Establishment and Firm Size: Table 5, "Employment Size of Firms for the United States: 2007, NAICS Code 517110," http://factfinder2.census.gov/bkmk/table/1.0/en/ECN/2007_US/51SSSZ1/naics~517110 (last visited July 10, 2015).

[24] *See id*.

[25] 13 CFR § 121.201, NAICS code 517110.

[26] Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service*, tbl. 5.3 (Sept. 2010), https://apps.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf (*Trends in Telephone Service*).

[27] *See id*.

[28] 13 CFR § 121.201, NAICS code 517110.

[29] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service*, tbl. 5.3 (2010) (*Trends in Telephone Service*).

[30] *See Trends in Telephone Service* at tbl. 5.3.

[31] *See id*.

nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[32] According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.[33] Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.[34] In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.[35] In addition, 72 carriers have reported that they are Other Local Service Providers.[36] Of the 72, seventy have 1,500 or fewer employees and two have more than 1,500 employees.[37] Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and other local service providers are small entities that may be affected by our proposed rules.

15. We have included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[38] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[39] We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

16. *Interexchange Carriers*. Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[40] According to Commission data,[41] 359 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our proposed rules.

17. *Operator Service Providers* (*OSPs*). Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a

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[32] 13 CFR § 121.201, NAICS code 517110.

[33] *See Trends in Telephone Service* at tbl.5.3.

[34] *See id.*

[35] *See id.*

[36] *See id.*

[37] *See id.*

[38] 5 U.S.C. § 601(3).

[39] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, Federal Communications Commission (filed May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." 15 U.S.C. § 632(a); 5 U.S.C. § 601(3). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 CFR § 121.102(b).

[40] 13 CFR § 121.201, NAICS code 517110.

[41] *Trends in Telephone Service*, tbl. 5.3.

business is small if it has 1,500 or fewer employees.[42] According to Commission data, 33 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 31 have 1,500 or fewer employees and two have more than 1,500 employees.[43] Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our proposed rules.

18. *Other Toll Carriers*. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[44] According to Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage.[45] Of these, an estimated 279 have 1,500 or fewer employees and five have more than 1,500 employees.[46] Consequently, the Commission estimates that most Other Toll Carriers are small entities that may be affected by rules adopted pursuant to the Notice.

4. Wireless Providers – Fixed and Mobile

19. The broadband Internet access service provider category covered by these proposed rules may cover multiple wireless firms and categories of regulated wireless services. Thus, to the extent the wireless services listed below are used by wireless firms for broadband Internet access service, the proposed actions may have an impact on those small businesses as set forth above and further below. In addition, for those services subject to auctions, we note that, as a general matter, the number of winning bidders that claim to qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments and transfers or reportable eligibility events, unjust enrichment issues are implicated.

20. *Wireless Telecommunications Carriers (except Satellite)*. Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.[47] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[48] For the category of Wireless Telecommunications Carriers (except Satellite), census data for 2007 show that there were 1,383 firms that operated for the entire year.[49] Of this total, 1,368 firms had employment of 999 or fewer employees and 15 had employment of 1000 employees or more.[50] Since all firms with fewer than 1,500 employees are considered small, given the total employment in the sector, we estimate that the vast majority of wireless firms are small.

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[42] 13 CFR § 121.201, NAICS code 517110.

[43] *Trends in Telephone Service*, tbl. 5.3.

[44] *See* 13 CFR § 121.201, NAICS code 517110.

[45] *See Trends in Telephone Service* at tbl. 5.3.

[46] *See id*.

[47] U.S. Census Bureau, 2012 NAICS Definitions, "517210 Wireless Telecommunications Categories (Except Satellite)"; http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517210&search=2012%20NAICS%20Search.

[48] 13 CFR § 121.201, NAICS code 517210 (2012 NAICS). The now-superseded, pre-2007 CFR citations were 13 CFR § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

[49] U.S. Census Bureau, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517210" (issued Nov. 2010).

[50] *See id*.

21. *Wireless Communications Services*. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of $15 million for each of the three preceding years.[51] The SBA has approved these definitions.[52]

22. *1670–1675 MHz Services*. This service can be used for fixed and mobile uses, except aeronautical mobile.[53] An auction for one license in the 1670–1675 MHz band was conducted in 2003. One license was awarded. The winning bidder was not a small entity.

23. *Wireless Telephony*. Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite).[54] Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.[55] According to Commission data, 413 carriers reported that they were engaged in wireless telephony.[56] Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.[57] Therefore, a little less than one third of these entities can be considered small.

24. *Broadband Personal Communications Service.* The broadband personal communications services (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission initially defined a "small business" for C- and F-Block licenses as an entity that has average gross revenues of $40 million or less in the three previous calendar years.[58] For F-Block licenses, an additional small business size standard for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[59] These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.[60] No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that claimed small business status in the first two C-Block auctions. A total of 93 bidders that claimed small business status won approximately 40 percent of the 1,479 licenses in the first auction for the D, E, and F Blocks.[61] On April 15, 1999, the Commission

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[51] *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service (WCS)*, Report and Order, 12 FCC Rcd 10785, 10879, para. 194 (1997).

[52] *See* Letter from Aida Alvarez, Administrator, SBA, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (filed Dec. 2, 1998) (*Alvarez Letter 1998*).

[53] 47 CFR § 2.106; *see generally* 47 CFR §§ 27.1-27.70.

[54] 13 CFR § 121.201, NAICS code 517210.

[55] *Id*.

[56] *Trends in Telephone Service*, tbl. 5.3.

[57] *Id.*

[58] *See Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendment of the Commission's Cellular/PCS Cross-Ownership Rule*, Report and Order, 11 FCC Rcd 7824, 7850-52, paras. 57-60 (1996) (*PCS Report and Order*); *see also* 47 CFR § 24.720(b).

[59] *See PCS Report and Order*, 11 FCC Rcd at 7852, para. 60.

[60] *See Alvarez Letter 1998*.

[61] *See Broadband PCS, D, E and F Block Auction Closes*, Public Notice, Doc. No. 89838 (rel. Jan. 14, 1997).

completed the reauction of 347 C-, D-, E-, and F-Block licenses in Auction No. 22.[62] Of the 57 winning bidders in that auction, 48 claimed small business status and won 277 licenses.

25. On January 26, 2001, the Commission completed the auction of 422 C and F Block Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in that auction, 29 claimed small business status.[63] Subsequent events concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. On February 15, 2005, the Commission completed an auction of 242 C-, D-, E-, and F-Block licenses in Auction No. 58. Of the 24 winning bidders in that auction, 16 claimed small business status and won 156 licenses.[64] On May 21, 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction No. 71.[65] Of the 12 winning bidders in that auction, five claimed small business status and won 18 licenses.[66] On August 20, 2008, the Commission completed the auction of 20 C-, D-, E-, and F-Block Broadband PCS licenses in Auction No. 78.[67] Of the eight winning bidders for Broadband PCS licenses in that auction, six claimed small business status and won 14 licenses.[68]

26. *Specialized Mobile Radio Licenses.* The Commission awards "small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years.[69] The Commission awards "very small entity" bidding credits to firms that had revenues of no more than $3 million in each of the three previous calendar years.[70] The SBA has approved these small business size standards for the 900 MHz Service.[71] The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.[72] A

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[62] *See C, D, E, and F Block Broadband PCS Auction Closes*, Public Notice, 14 FCC Rcd 6688 (WTB 1999). Before Auction No. 22, the Commission established a very small standard for the C Block to match the standard used for F Block. *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, Fourth Report and Order, 13 FCC Rcd 15743, 15768, para. 46 (1998).

[63] *See C and F Block Broadband PCS Auction Closes; Winning Bidders Announced*, Public Notice, 16 FCC Rcd 2339 (2001).

[64] *See Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58*, Public Notice, 20 FCC Rcd 3703 (2005).

[65] *See Auction of Broadband PCS Spectrum Licenses Closes; Winning Bidders Announced for Auction No. 71*, Public Notice, 22 FCC Rcd 9247 (2007).

[66] *Id*.

[67] *See Auction of AWS-1 and Broadband PCS Licenses Closes; Winning Bidders Announced for Auction 78*, Public Notice, 23 FCC Rcd 12749 (WTB 2008).

[68] *Id*.

[69] 47 CFR § 90.814(b)(1).

[70] *Id*.

[71] *See* Letter from Aida Alvarez, Administrator, SBA, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission (filed Aug. 10, 1999) (*Alvarez Letter 1999*).

[72] *See Correction to Public Notice DA 96-586 "FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas,"* Public Notice, 18 FCC Rcd 18367 (WTB 1996).

second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.[73]

27. The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band and qualified as small businesses under the $15 million size standard.[74] In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were awarded.[75] Of the 22 winning bidders, 19 claimed small business status and won 129 licenses. Thus, combining all four auctions, 41 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small businesses.

28. In addition, there are numerous incumbent site-by-site SMR licenses and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. In addition, we do not know how many of these firms have 1,500 or fewer employees, which is the SBA-determined size standard.[76] We assume, for purposes of this analysis, that all of the remaining extended implementation authorizations are held by small entities, as defined by the SBA.

29. *Lower 700 MHz Band Licenses*. The Commission previously adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.[77] The Commission defined a "small business" as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years.[78] A "very small business" is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years.[79] Additionally, the lower 700 MHz Service had a third category of small business status for Metropolitan/Rural Service Area (MSA/RSA) licenses—"entrepreneur"—which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years.[80] The SBA approved these small size standards.[81] An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were won by 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur

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[73] *See Multi-Radio Service Auction Closes*, Public Notice, 17 FCC Rcd 1446 (WTB 2002).

[74] *See 800 MHz Specialized Mobile Radio (SMR) Service General Category (851–854 MHz) and Upper Band (861–865 MHz) Auction Closes; Winning Bidders Announced*, Public Notice, 15 FCC Rcd 17162 (2000).

[75] *See 800 MHz SMR Service Lower 80 Channels Auction Closes; Winning Bidders Announced*, Public Notice, 16 FCC Rcd 1736 (2000).

[76] *See generally* 13 CFR § 121.201, NAICS code 517210.

[77] *See Reallocation and Service Rules for the 698–746 MHz Spectrum Band (Television Channels 52–59),* Report and Order, 17 FCC Rcd 1022 (2002) (*Channels 52–59 Report and Order*).

[78] *See id.* at 1087-88, para. 172.

[79] *See id*.

[80] *See id.*, at 1088, para. 173.

[81] *See Alvarez Letter 1999*.

status and won a total of 329 licenses.[82] A second auction commenced on May 28, 2003, closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 Cellular Market Area licenses.[83] Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.[84] On July 26, 2005, the Commission completed an auction of 5 licenses in the Lower 700 MHz band (Auction No. 60). There were three winning bidders for five licenses. All three winning bidders claimed small business status.

30. In 2007, the Commission reexamined its rules governing the 700 MHz band in the *700 MHz Second Report and Order*.[85] An auction of 700 MHz licenses commenced January 24, 2008 and closed on March 18, 2008, which included, 176 Economic Area licenses in the A Block, 734 Cellular Market Area licenses in the B Block, and 176 EA licenses in the E Block.[86] Twenty winning bidders, claiming small business status (those with attributable average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years) won 49 licenses. Thirty three winning bidders claiming very small business status (those with attributable average annual gross revenues that do not exceed $15 million for the preceding three years) won 325 licenses.

31. *Upper 700 MHz Band Licenses*. In the *700 MHz Second Report and Order*, the Commission revised its rules regarding Upper 700 MHz licenses.[87] On January 24, 2008, the Commission commenced Auction 73 in which several licenses in the Upper 700 MHz band were available for licensing: 12 Regional Economic Area Grouping licenses in the C Block, and one nationwide license in the D Block.[88] The auction concluded on March 18, 2008, with 3 winning bidders claiming very small business status (those with attributable average annual gross revenues that do not exceed $15 million for the preceding three years) and winning five licenses.

32. *700 MHz Guard Band Licensees*. In 2000, in the 700 MHz Guard Band Order, the Commission adopted size standards for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[89] A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years.[90] Additionally, a very small business is an entity that, together with its affiliates and controlling principals, has average gross

[82] *See Lower 700 MHz Band Auction Closes*, Public Notice, 17 FCC Rcd 17272 (WTB 2002).

[83] *See id.*

[84] *See id.*

[85] *Service Rules for the 698–746, 747–762 and 777–792 MHz Band; Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones; Biennial Regulatory Review—Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services; Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010; Declaratory Ruling on Reporting Requirement under Commission's Part 1 Anti-Collusion Rule*, Second Report and Order, 22 FCC Rcd 15289, 15359 n. 434 (2007) (*700 MHz Second Report and Order*).

[86] *See Auction of 700 MHz Band Licenses Closes*, Public Notice, 23 FCC Rcd 4572 (WTB 2008).

[87] *700 MHz Second Report and Order*, 22 FCC Rcd 15289.

[88] *See Auction of 700 MHz Band Licenses Closes*, Public Notice, 23 FCC Rcd 4572 (WTB 2008).

[89] *See Service Rules for the 746–764 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, Second Report and Order, 15 FCC Rcd 5299 (2000) (*746–764 MHz Band Second Report and Order*).

[90] *See id.* at 5343, para. 108.

revenues that are not more than $15 million for the preceding three years.[91] SBA approval of these definitions is not required.[92] An auction of 52 Major Economic Area licenses commenced on September 6, 2000, and closed on September 21, 2000.[93] Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.[94]

33. *Air-Ground Radiotelephone Service*. The Commission has previously used the SBA's small business size standard applicable to Wireless Telecommunications Carriers (except Satellite), i.e., an entity employing no more than 1,500 persons.[95] There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and under that definition, we estimate that almost all of them qualify as small entities under the SBA definition. For purposes of assigning Air-Ground Radiotelephone Service licenses through competitive bidding, the Commission has defined "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $40 million.[96] A "very small business" is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $15 million.[97] These definitions were approved by the SBA.[98] In May 2006, the Commission completed an auction of nationwide commercial Air-Ground Radiotelephone Service licenses in the 800 MHz band (Auction No. 65). On June 2, 2006, the auction closed with two winning bidders winning two Air-Ground Radiotelephone Services licenses. Neither of the winning bidders claimed small business status.

34. *AWS Services (1710–1755 MHz and 2110–2155 MHz bands (AWS-1); 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz bands (AWS-2); 2155–2175 MHz band (AWS-3))*. For the AWS-1 bands,[99] the Commission has defined a "small business" as an entity with average annual gross revenues for the preceding three years not exceeding $40 million, and a "very small business" as an entity with average annual gross revenues for the preceding three years not exceeding $15 million. For AWS-2 and AWS-3, although we do not know for certain which entities are likely to apply

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[91] *See id.*

[92] *See id.* at 5343, para. 108 n.246 (for the 746–764 MHz and 776–794 MHz bands, the Commission is exempt from 15 U.S.C. § 632, which requires Federal agencies to obtain SBA approval before adopting small business size standards).

[93] *See 700 MHz Guard Bands Auction Closes: Winning Bidders Announced*, Public Notice, 15 FCC Rcd 18026 (WTB 2000).

[94] *See 700 MHz Guard Bands Auction Closes: Winning Bidders Announced*, Public Notice, 16 FCC Rcd 4590 (WTB 2001).

[95] 13 CFR § 121.201, NAICS codes 517210.

[96] *Amendment of Part 22 of the Commission's Rules to Benefit the Consumers of Air-Ground Telecommunications Services*, *Biennial Regulatory Review—Amendment of Parts 1, 22, and 90 of the Commission's Rules*, *Amendment of Parts 1 and 22 of the Commission's Rules to Adopt Competitive Bidding Rules for Commercial and General Aviation Air-Ground Radiotelephone Service*, Order on Reconsideration and Report and Order, 20 FCC Rcd 19663, paras. 28-42 (2005).

[97] *Id.*

[98] *See* Letter from Hector V. Barreto, Administrator, SBA, to Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission (filed Sept. 19, 2005).

[99] The service is defined in section 90.1301 *et seq*. of the Commission's Rules, 47 CFR § 90.1301 *et seq*.

for these frequencies, we note that the AWS-1 bands are comparable to those used for cellular service and personal communications service. The Commission has not yet adopted size standards for the AWS-2 or AWS-3 bands but proposes to treat both AWS-2 and AWS-3 similarly to broadband PCS service and AWS-1 service due to the comparable capital requirements and other factors, such as issues involved in relocating incumbents and developing markets, technologies, and services.[100]

35. *3650–3700 MHz band*. In March 2005, the Commission released a *Report and Order and Memorandum Opinion and Order* that provides for nationwide, non-exclusive licensing of terrestrial operations, utilizing contention-based technologies, in the 3650 MHz band (i.e., 3650–3700 MHz). As of April 2010, more than 1270 licenses have been granted and more than 7433 sites have been registered. The Commission has not developed a definition of small entities applicable to 3650–3700 MHz band nationwide, non-exclusive licensees. However, we estimate that the majority of these licensees are Internet Access Service Providers (ISPs) and that most of those licensees are small businesses.

36. *Fixed Microwave Services.* Microwave services include common carrier,[101] private-operational fixed,[102] and broadcast auxiliary radio services.[103] They also include the Local Multipoint Distribution Service (LMDS),[104] the Digital Electronic Message Service (DEMS),[105] and the 24 GHz Service,[106] where licensees can choose between common carrier and non-common carrier status.[107] At present, there are approximately 36,708 common carrier fixed licensees and 59,291 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. There are approximately 135 LMDS licensees, three DEMS licensees, and three 24 GHz licensees. The Commission has not yet defined a small business with respect to microwave services. For purposes of the IRFA, we will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—i.e., an entity with no more than 1,500 persons.[108] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[109] The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service

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[100] *See Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Report and Order, 18 FCC Rcd 25162, Appx. B (2003), *modified by Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Order on Reconsideration, 20 FCC Rcd 14058, Appx. C (2005); *Service Rules for Advanced Wireless Services in the 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz Bands; Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Notice of Proposed Rulemaking, 19 FCC Rcd 19263, Appx. B (2005); *Service Rules for Advanced Wireless Services in the 2155–2175 MHz Band*, Notice of Proposed Rulemaking, 22 FCC Rcd 17035, Appx. (2007).

[101] *See* 47 CFR Part 101, Subparts C and I.

[102] *See* 47 CFR Part 101, Subparts C and H.

[103] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 CFR Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

[104] *See* 47 CFR Part 101, Subpart L.

[105] *See* 47 CFR Part 101, Subpart G.

[106] *See id.*

[107] *See* 47 CFR §§ 101.533, 101.1017.

[108] 13 CFR § 121.201, NAICS code 517210.

[109] 13 CFR § 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 CFR citations were 13 CFR § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are up to 36,708 common carrier fixed licensees and up to 59,291 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies adopted herein. We note, however, that the common carrier microwave fixed licensee category includes some large entities.

37. *Broadband Radio Service and Educational Broadband Service*. Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).[110] In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years.[111] The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.[112] After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules.

38. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.[113] The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid.[114] Auction 86 concluded in 2009 with the sale of 61 licenses.[115] Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

39. In addition, the SBA's Cable Television Distribution Services small business size

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[110] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995).

[111] 47 CFR § 21.961(b)(1).

[112] 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1500 or fewer employees.

[113] *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

[114] *Id.* at 8296 para. 73.

[115] *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

standard is applicable to EBS. There are presently 2,436 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.[116] Thus, we estimate that at least 2,336 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."[117] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use the most current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having $13.5 million or less in annual receipts.[118] According to Census Bureau data for 2007, there were a total of 996 firms in this category that operated for the entire year.[119] Of this total, 948 firms had annual receipts of under $10 million, and 48 firms had receipts of $10 million or more but less than $25 million.[120] Thus, the majority of these firms can be considered small.

5. Satellite Service Providers

40. *Satellite Telecommunications Providers.* Two economic census categories address the satellite industry. The first category has a small business size standard of $30 million or less in average annual receipts, under SBA rules.[121] The second has a size standard of $30 million or less in annual receipts.[122]

41. The category of Satellite Telecommunications "comprises establishments primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications."[123] For this category, Census Bureau data for 2007 show that there were a total of 570 firms that operated for the entire year.[124] Of this total, 530 firms had annual receipts of under $30 million, and 40 firms had receipts of over $30 million.[125] Consequently, we estimate that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

42. The second category of Other Telecommunications comprises, *inter alia*, "establishments

[116] The term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on EBS licensees.

[117] U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers," (partial definition), http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517110&search=2012.

[118] 13 CFR § 121.201, NAICS code 517110.

[119] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Receipts by Enterprise Employment Size for the United States: 2007, NAICS code 517510 (rel. Nov. 19, 2010).

[120] *Id.*

[121] 13 CFR § 121.201, NAICS Code 517410.

[122] 13 CFR § 121.201, NAICS Code 517919.

[123] U.S. Census Bureau, 2012 NAICS Definitions, "517410 Satellite Telecommunications," http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517410&search=2012.

[124] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, "Establishment and Firm Size," NAICS code 517410 (released Nov. 19, 2010).

[125] *Id.*

primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems."[126] For this category, Census Bureau data for 2007 show that there were a total of 1,274 firms that operated for the entire year.[127] Of this total, 1,252 had annual receipts below $25 million per year.[128] Consequently, we estimate that the majority of All Other Telecommunications firms are small entities that might be affected by our action.

6. Cable Service Providers

43. Because section 706 requires us to monitor the deployment of broadband using any technology, we anticipate that some broadband service providers may not provide telephone service. Accordingly, we describe below other types of firms that may provide broadband services, including cable companies, MDS providers, and utilities, among others.

44. *Cable and Other Program Distributors*. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."[129] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having $13.5 million or less in annual receipts.[130] According to Census Bureau data for 2007, there were a total of 2,048 firms in this category that operated for the entire year.[131] Of this total, 1,393 firms had annual receipts of under $10 million, and 655 firms had receipts of $10 million or more.[132] Thus, the majority of these firms can be considered small.

45. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.[133] Industry data shows that

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[126] U.S. Census Bureau, 2012 NAICS Definitions, "517919 All Other Telecommunications," http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517919&search=2012.

[127] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, "Establishment and Firm Size," NAICS code 517410 (released Nov. 19, 2010).

[128] *Id.*

[129] U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers," (partial definition), http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517110&search=2012.

[130] 13 CFR § 121.201, NAICS code 517110.

[131] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, "Establishment and Firm Size," NAICS code 517110 (released Nov. 19, 2010).

[132] *Id.*

[133] 47 CFR § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

there were 1,141 cable companies at the end of June 2012.[134] Of this total, all but ten cable operators nationwide are small under this size standard.[135] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[136] Current Commission records show 4,945 cable systems nationwide.[137] Of this total, 4,380 cable systems have less than 20,000 subscribers, and 565 systems have 20,000 or more subscribers, based on the same records. Thus, under this standard, we estimate that most cable systems are small entities.

46. *Cable System Operators*. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[138] The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[139] Based on available data, we find that all but ten incumbent cable operators are small entities under this size standard.[140] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[141] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

7. All Other Telecommunications

47. *Electric Power Generators, Transmitters, and Distributors*. The Census Bureau defines this industry as including "establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry

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[134] NCTA, Industry Data, Number of Cable Operating Companies (June 2012), http://www.ncta.com/Statistics.aspx (visited Sept. 28, 2012). Depending upon the number of homes and the size of the geographic area served, cable operators use one or more cable systems to provide video service. *See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10496, 10505-06, para. 24 (2013) (*15th Annual Competition Report)*.

[135] *See* SNL Kagan, "Top Cable MSOs – 12/12 Q", http://www.snl.com/InteractiveX/TopCableMSOs.aspx?period=2012Q4&sortcol=subscribersbasic&sortorder=desc. We note that, when applied to an MVPD operator, under this size standard (i.e., 400,000 or fewer subscribers) all but 14 MVPD operators would be considered small. *See* NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), http://www.ncta.com/industry-data. The Commission applied this size standard to MVPD operators in its implementation of the CALM Act. *See Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Report and Order, 26 FCC Rcd 17222, 17245-46, para. 37 (2011) (*CALM Act Report and Order*) (defining a smaller MVPD operator as one serving 400,000 or fewer subscribers nationwide, as of December 31, 2011).

[136] 47 CFR § 76.901(c).

[137] The number of active, registered cable systems comes from the Commission's Cable Operations and Licensing System (COALS) database on Aug. 28, 2013. A cable system is a physical system integrated to a principal headend.

[138] 47 U.S.C. § 543(m)(2); *see* 47 CFR § 76.901(f) & nn.1-3.

[139] 47 CFR § 76.901(f); *see FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

[140] *See* NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), http://www.ncta.com/industry-data.

[141] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 CFR § 76.909(b).

also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or Voice over Internet Protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry."[142] The SBA has developed a small business size standard for this category; that size standard is $32.5 million or less in average annual receipts.[143] According to Census Bureau data for 2007, there were 2,383 firms in this category that operated for the entire year.[144] Of these, 2,346 firms had annual receipts of under $25 million and 37 firms had annual receipts of $25 million or more.[145] Consequently, we estimate that the majority of these firms are small entities that may be affected by rules adopted pursuant to the Notice.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

48. As indicated above, the Notice seeks comment on modifications to the Commission's existing no-blocking rule, no-throttling rule, no paid prioritization rule, and transparency rule, and it proposes eliminating the Internet conduct standard. While we anticipate that the removal or modification of burdensome regulations will lead to a long-term reduction in reporting, recordkeeping, or other compliance requirements on some small entities, the potential modifications, if adopted, could initially impose additional reporting, recordkeeping, or other compliance requirements on some small entities.[146]

E. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

49. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[147] We expect to consider all of these factors when we have received substantive comment from the public and potentially affected entities.

50. The Commission expects to consider the economic impact on small entities, as identified in comments filed in response to the Notice and this IRFA, in reaching its final conclusions and taking action in this proceeding.

51. We seek comment here on the effect the various proposals described in the Notice, and summarized above, will have on small entities, and on what effect alternative rules would have on those entities. How can the Commission achieve its goal of protecting and promoting an open Internet while also imposing minimal burdens on small entities? What specific steps could the Commission take in this regard?

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[142] U.S. Census Bureau, 2012 NAICS Definitions, *517919 All Other Telecommunications*, http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517919&search=2012 (last visited July 16, 2015).

[143] *See* 13 CFR § 121.201, NAICS code 517919.

[144] U.S. Census Bureau, 2007 Economic Census, Information: Subject Series – Establishment and Firm Size: Table 4, "Receipts Size of Firms for the United States: 2007, NAICS Code 517919," http://factfinder2.census.gov/bkmk/table/1.0/en/ECN/2007_US/51SSSZ4/naics~517919 (last visited July 16, 2015).

[145] *See id*.

[146] *See* Notice, Section III.

[147] 5 U.S.C. § 603(c).

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

52. None.

ATTACHMENT B

OPEN MEETING AGENDA from the Federal Communications Commission

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For Immediate Release

FCC ANNOUNCES TENTATIVE AGENDA FOR MAY OPEN MEETING

WASHINGTON, April 27, 2017 – Federal Communications Commission Chairman Ajit Pai announced that the following items are tentatively on the agenda for the May Open Commission Meeting scheduled for Thursday, May 18, 2017:

Satellite Earth Stations in Motion – The Commission will consider a Notice of Proposed Rulemaking that would both facilitate the deployment of and reduce regulatory burdens on the three types of Fixed-Satellite Service earth stations authorized to transmit while in motion: Earth Stations on Vessels, Vehicle-Mounted Earth Stations, and Earth Stations Aboard Aircraft. (IB Docket No. 17-95)

Part 95 Reform – The Commission will consider a Report and Order that would amend provisions of the Personal Radio Services located in Part 95 of the Commission's rules in order to address two Petitions for Rulemaking, update and modernize various rules to reflect current uses and technologies, remove outdated regulatory requirements, and reorganize the rules to make them easier to read and understand. (WT Docket No. 10-119, RM-10762, RM-10844)

Modernization of Media Regulation Initiative – The Commission will consider a Public Notice that would launch a review of the Commission's rules applicable to media entities and seek comment on what rules should be modified or repealed. (MB Docket No. 17-105)

Proposed Elimination of Main Studio Rule – The Commission will consider a Notice of Proposed Rulemaking that would propose to eliminate the Commission's main studio rule, based on a tentative finding that the rule is now outdated and unnecessarily burdensome for broadcast stations. (MB Docket No. 17-106)

Restoring Internet Freedom – The Commission will consider a Notice of Proposed Rulemaking that would propose to restore the Internet to a light-touch regulatory framework by classifying broadband Internet access service as an information service and by seeking comment on the existing rules governing Internet service providers' practices. (WC Docket No. 17-108)

Connect America Fund – The Commission will consider a Notice of Proposed Rulemaking that proposes to eliminate a rule requiring rural telecommunications service providers receiving USF support to impose higher minimum monthly rates on their customers than the rates paid by some of their urban counterparts, or otherwise lose some USF support. The Commission will also consider a related Order that would freeze the current rate. (WC Docket No. 10-90)

Public Drafts of Meeting Items – Continuing the Chairman's pilot program, the FCC is publicly releasing the draft text of each item expected to be considered at the next Open Commission Meeting. One-page cover sheets summarize each item. All these materials will be available on the event page for the Open Meeting: https://go.usa.gov/xX5Qn

The Open Meeting is scheduled to commence at 10:30 a.m. in Room TW-C305 of the Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. Open Meetings are steamed live at www.fcc.gov/live and can be followed on social media with #OpenMtgFCC.

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This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v. FCC. 515 F 2d 385 (D.C. Circ 1974).